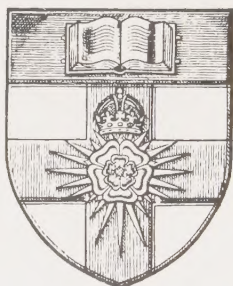


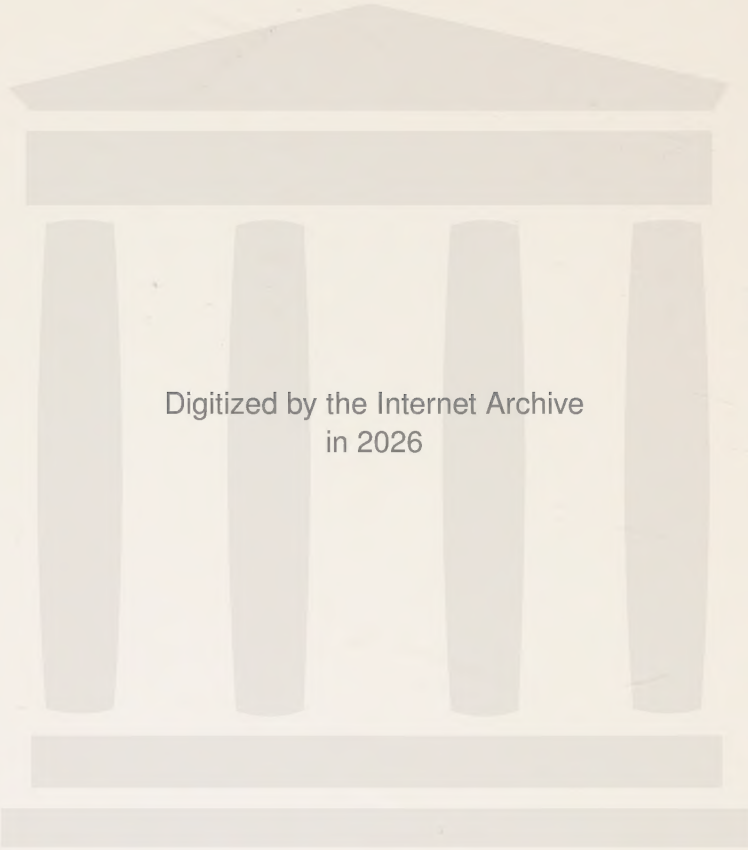
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THE
CRIMINAL APPEAL REPORTS

WITH
SUBJECT INDEX, TABLES OF CASES AND
STATUTES CITED

JUNE 28, 1948 TO AUGUST 30, 1949

EDITED BY
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OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

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INDEX OF APPELLANTS AND APPLICANTS

	PAGE		PAGE
BEDFORD, E.	17	KOSCIUKIEWICZ, A.	41
Brook, J. H.	92	Kritz, A. B.	169
Browes, D.	164		
		LEITZ, C.	132
CLAYTON-WRIGHT, D. ..	22	MARSH, R. W. F.	185
Clucas, J.	136		
		NEAL, F.	189
DALTON, J.	102	Norris, L.	126
De Rable, K. V. M. ..	5		
Dickinson, C. T.	5	O'NEILL, V. N.	10
FAIRBAIRN, W. J.	179	PERCY DALTON (LONDON),	
		LTD.	102
GARTH, W. D.	100	Porter, C.	76
Gomer, B. E.	91		
Green, P. E.	14	SEMINI, G.	51
		Sherman, W. N.	159
H. SHERMAN, LTD.	151	Strong, J.	102
Hayward, A. T.	1		
Hughes, E. O.	59	THOMAS, J.	74
		Thomes, L. J.	200
JENNINGS, B. E.	143	ULATOWSKI, J.	41
Jones, G. V.	11		
Jones, J. L.	33	WAY, P. J. E.	159

CIRCUIT CASES

	PAGE
BLAKEMORE, F. M.	49
CLARKE, J.	216
DOLMAN, W.	128
MADDISON T.	30
RAHMAN, A.	121

DIVISIONAL COURT CASE

	PAGE
RUSE v. Read	67

TABLE OF CASES

[The letters " R. v. " in criminal cases are omitted]

	PAGE		PAGE
ABBOT (1847)	138	Hudson (1943)	73
Abramovitch (1914)	100-2	Hughes (1927)	143, 144, 149
Ashwell (1885)	72	Hunt (1918)	176
		Hyde v. Hyde and Wood-	
BALL (1910)	185-7	mansee (1866)	124
Bassey (1931)	138		
Belton v. Busby and Woods		KETTERIDGE (1915) ..	189, 190, 193,
(1899)	77, 81		194, 196, 198, 199
Bennet and Newton (1913) ..	138		
Berthiaume v. Dastous (1929)	124	LAITWOOD (1910)	110
Bertrand (1867)	197	Ledwith v. Roberts (1937) ..	179-82,
Brown (1890)	108		184, 185
Brown and others (1899)	110	Leon (1944)	138, 140
Button (1897)	136, 140	Levy (1911)	33, 39
		Lincoln (1944)	1, 2, 3
CARPENTER (1911)	169, 173, 176	London and Globe Finance	
Charlesworth (1860)	191	Corporation, Ltd., Re (1903)	138
Christie (1914)	66		
Clayton (1943)	108, 113	MANCINI v. Director of Public	
Collins (1864)	109	Prosecutions (1941) ..	51, 52, 58
Crane (1921) ..	189, 193, 196, 198	Martin (1867)	138
		Miles (1890)	200, 202-4,
DAILY MIRROR NEWSPAPERS,			207-8
Ltd. (1922)	154, 158	Milne v. City of London	
De Salvi (1867)	209	Police Commissioner (1939) ..	76,
Deaville (1903)	76, 77, 79,		77, 80, 84-9
	82, 84, 89	Morris (1867)	200, 204-9
Director of Public Prosecu-		Murphy (1869)	191, 197
tions v. Beard (1920)	70	Murray (1935)	30
Dodd (1877)	109		
		NICHOLSON (1947)	199
ERRINGTON (1922)	144, 150	Noble v. Southern Ry. (1940)	83
FRIEL (1890)	207-8	O'CONNELL AND OTHERS (1844)	190
GRONDOWSKI AND MALINOWSKI		PARKER AND BULTEEL (1916) ..	174
(1946)	28	Pickup (1931)	169, 175, 176
		Powell v. Kempton Park	
HALES (1924)	191	Racecourse Co. (1899) ..	76, 77,
Hansill (1849)	34		79-82, 85-88
Hartley v. Ellnor (1917) ..	181,		
	182	RILEY (1853)	67, 71-3
Hawke v. Dunn (1897)	88	Rowley (1948)	35
Hewitt (1925)	186, 187		
Holmes v. Director of Public		SHELLAKER (1914)	186, 187
Prosecutions (1946) ..	51, 53, 58	Sims (1946)	61
		Sinha Peerage Case (1939) ..	124

	PAGE		PAGE
Smith (1837)	52, 57	Tonks (1916)	213-4
Smith, J. R. (1923)	1, 3	WEIROW (1945)	131
Snow (1776)	52, 57	White (1910)	211, 213
Srini Vasan (otherwise Clay- ton) v. Srini Vasan (1946)	121, 124	Whittall v. Kirby (1947)	132, 135
Stirland v. Director of Public Prosecutions (1944)	189, 194	Williams (1893)	109
		Winsor (1865)	193, 194, 197, 198
TAYLOR (1771)	52, 57	YOUNG v. Darrah (1928)	88
Thompson (1918)	64		

TABLE OF STATUTES

	PAGE
1822. 3 Geo. 4, c. 46 (Levy of Fines Act), s. 2	96, 99
1824. 5 Geo. 4, c. 83 (Vagrancy Act), s. 4	179, 180, 181, 184
1828. 9 Geo. 4, c. 31 (Offences against the Person Act) (rep.), s. 10	56, 57
1836. 6 & 7 Will. 4, c. 85 (Marriage Act), s. 39	131-5
1846. 9 & 10 Vict. c. 62 (Deodands) (rep.)	57
1848. 11 & 12 Vict. c. 42 (Indictable Offences Act), s. 22	154
	s. 25
	s. 27
11 & 12 Vict. c. 43 (Summary Jurisdiction Act), s. 5	107, 114
1853. 16 & 17 Vict. c. 119 (Betting Act), s. 1	78, 152, 163
	s. 3
22 & 23 Vict. c. 17 (Vexatious Indictments Act) (rep.), s. 1 ..	153
22 & 23 Vict. c. 21 (Queen's Remembrancer Act), s. 32	96, 99
1861. 24 & 25 Vict. c. 94 (Accessories and Abettors Act), s. 8 ..	107, 114
24 & 25 Vict. c. 97 (Malicious Damage Act), s. 42	22
	s. 43
24 & 25 Vict. c. 100 (Offences against the Person Act),	
s. 7	56
ss. 11-15	211, 212
s. 57	123, 125, 128, 129
1871. 34 & 35 Vict. c. 112 (Prevention of Crimes Act), s. 15 ..	179, 180,
	181, 184
1889. 52 & 53 Vict. c. 63 (Interpretation Act), s. 27	154
	s. 33
1891. 54 & 55 Vict. c. 69 (Penal Servitude Act), s. 7	181
1906. 6 Edw. 7, c. 34 (Prevention of Corruption Act), s. 1 (1) ..	5-9
1907. 7 Edw. 7, c. 23 (Criminal Appeal Act), s. 5 (2)	1-5, 93-4
	s. 19 (b)
1908. 8 Edw. 7, c. 59 (Prevention of Crime Act) (rep.), s. 1 (1) ..	14,
	15, 20
8 Edw. 7, c. 67 (Children Act) (rep.), s. 12	213-4
1911. 1 & 2 Geo. 5, c. 6 (Perjury Act), s. 9	156
1915. 5 & 6 Geo. 5, c. 90 (Indictments Act)	197
	s. 4
	s. 5
	s. 5 (1)
	Sched. I, r. 3
1916. 6 & 7 Geo. 5, c. 50 (Larceny Act), s. 32 (1)	136, 140
	s. 43 (b)
6 & 7 Geo. 5, c. 64 (Prevention of Corruption Act),	
s. 2	5, 6, 7, 9, 10
1917. 7 Geo. 5, c. 4 (Grand Juries (Suspension) Act) (rep.)	153, 154
1925. 15 & 16 Geo. 5, c. 86 (Criminal Justice Act), s. 14 (1)	31
	s. 33 (1) ..
	155-6, 158

BEFORE

MR. JUSTICE SINGLETON, MR. JUSTICE CASSELS
AND MR. JUSTICE SLADE.

1948.
June 28.

ARTHUR THOMAS HAYWARD.

Verdict—Substitution—Alternative Counts for Larceny and Receiving—Case Treated as One of Larceny—No Direction on Receiving—Conviction of Receiving—Refusal to Substitute Verdict of Larceny—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 5 (2).

The appellant was charged with larceny of, and in the alternative with receiving, certain property. The case throughout was treated as one of larceny, and the summing-up contained no direction on receiving. The jury, however, found the appellant Not Guilty of larceny, but Guilty of receiving.

Held, following LINCOLN (1944), 29 Cr. App. R. 191, that the verdict could not stand; and that, in the absence of any request by counsel for the Crown to substitute a verdict of larceny, the Court would not consider the exercise of any discretion which it might have under section 5 (2) of the Criminal Appeal Act, 1907, to substitute such a verdict.

Quære, whether in view of the acquittal on the count for larceny, the Court would have any discretion to substitute a verdict of Guilty of larceny.

SMITH (J. R.) (1923), 17 Cr. App. R. 133, considered.

Appeal against conviction.

The appellant was convicted at Yorkshire (West Riding) Quarter Sessions on April 13, 1948, of receiving stolen property and was sentenced by the Chairman to three years' penal servitude.

The indictment contained two counts. The first count charged the appellant with stealing a box containing twenty-four women's smocks, the property of the British Transport Commission, and the second charged him with receiving the same property knowing it to have been stolen. The case was treated throughout as one of larceny only and the Chairman

1948.
June 28.

ARTHUR
THOMAS
HAYWARD.

Singleton, J.,
Cassels, J.,
Slade, J.

directed the jury on that basis and gave no direction on the alternative count for receiving. The jury, however, found the appellant Not Guilty of larceny, but Guilty of receiving.

M. Clough, for the appellant:

The verdict was unreasonable and should not be allowed to stand. The case throughout was treated as one of larceny and the Chairman directed the jury on larceny only. There was no evidence that the appellant received the goods from anyone. LINCOLN (1944) 29 Cr. App. R. 191, is an authority directly in point, and shows that in such circumstances a conviction cannot stand. It would not be right for the Court to exercise its power under s. 5 (2) of the Criminal Appeal Act, 1907, and substitute a verdict of larceny, because the jury have acquitted the appellant specifically of that offence.

Dennis Robson, for the Crown:

The prosecution do not in this case invite the Court to substitute a verdict under s. 5 (2).

SLADE, J.: It is clear that the two counts were alternative and that the appellant could not have been convicted on both. The Chairman gave the jury a reasonably adequate direction on the first count relating to larceny, and concluded his observations with these words: "I do not think there is anything further I can put before you, so you will consider your verdict. In my opinion, I think you want to deal with the first count. If you cannot bring in a verdict on that, you must try the second one". The jury retired, and, on their return, were asked whether they found the prisoner guilty or not guilty on the first count which charged larceny, and on that charge they found him Not Guilty. They were then asked how they found with regard to the second count which charged receiving, and on that count they found the appellant Guilty.

It is common ground that that verdict cannot stand. There was no direction to the jury of any kind whatsoever by the Chairman on the count for receiving, and, indeed, I go further and say that there was no evidence at all that the appellant

received the goods from anyone. The case of LINCOLN (*supra*), and particularly the observations of Humphreys, J., in delivering the judgment of the Court in that case, show that in those circumstances the verdict cannot be allowed to stand.

The only question, accordingly, which arises is whether the Court will still in the circumstances of this particular case apply the provisions of s. 5 (2) of the Criminal Appeal Act, 1907, which provides: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity". It is obvious from the wording of that sub-section that before the powers of this Court arise at all, it must be satisfied that the jury must have been satisfied of facts which proved the appellant guilty of the other offence, and if, and only if, this Court is so satisfied, this Court then has a discretion in each particular case whether it will substitute a verdict or not.

At first sight it seems difficult to say that this Court could hold that a jury must have been satisfied of facts which proved a person to be guilty of an offence when, after a direction which we must assume to be accurate, they found him not guilty of that particular offence. Speaking for myself, had it not been for the case of SMITH, J. R. (1923), 17 Cr. App. R. 133, I should have found it difficult to see how the position could arise when the appellant has in fact been found not guilty of the proposed substituted offence. But in SMITH (*supra*) there appears (at p. 134) the following observation by the Lord Chief Justice (Lord Hewart), on being asked to substitute a verdict of guilty of larceny: "A verdict the jury refused to find". In that case also the indictment contained two

1948.
June 28.

ARTHUR
THOMAS
HAYWARD.

Singleton, J.,
Cassels, J.,
Slade, J.

1948.
June 28.

ARTHUR
THOMAS
HAYWARD.

Singleton, J.,
Cassels, J.,
Slade, J.

counts, one for larceny and one for receiving, which were alternative just as the counts in the present case were. The jury in that case found the prisoner guilty of receiving, and it seems to follow that they must have found him not guilty, either expressly or by implication, of the offence of larceny and that the Lord Chief Justice was referring to that finding when he made the observation. It is perfectly true that in that case the appellant was actually seen to take the boat hook which he was charged with stealing, or alternatively receiving, from the flat where it was kept, but, before following the decision in that case, the Court at least would require to examine the record so that it could see, among other things, precisely what direction was given to the jury on the alternative count for larceny, and whether the jury found the prisoner not guilty of larceny, or merely contented themselves with finding him guilty of receiving without expressing any view on the count for larceny. Assuming, however, that it would be open to this Court after examining the case of SMITH, J. R. (*supra*) in detail to apply the provisions of s. 5 (2), the question still remains whether in this particular case the Court should exercise its discretion by substituting a verdict. The Court has had the advantage of hearing counsel both for the appellant and the Crown, and counsel for the Crown, far from asking the Court to apply the provisions of s. 5 (2), agrees with counsel for the appellant that the Court ought not to be asked to apply it. It might also be added that, after the evidence had been heard, the case appeared to involve larceny by finding, and the direction to the jury on the first count was confined solely to larceny by finding and did not deal with the ordinary case of simple larceny. There was, too, the unusual feature that it was conceded that one, Edward Green, who had been convicted at the same quarter sessions on the previous day, had asked the Court to take into consideration this very offence of stealing the box containing the twenty-four smocks.

It is, however, sufficient for the decision of the present case to say that, even if it has the jurisdiction to apply the provisions

of s. 5 (2) and to substitute another verdict, since counsel for the Crown does not ask the Court to exercise its discretion in that manner, the Court does not propose to substitute any other verdict for that found by the jury. The result, accordingly, is that the appeal will be allowed and the conviction quashed.

1948.
June 28.

ARTHUR
THOMAS
HAYWARD.

Singleton, J.,
Cassels, J.,
Slade, J.

Conviction quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE BIRKETT
MR. JUSTICE PRITCHARD.

GEORGE TAUNT DICKINSON.

KATHERINE VERONICA MANTON DE RABLE.

1948.
July 9.

Summing-up—Onus of Proof—Corruption—Agent—Misdirection on Two Counts—Conviction on Remaining Count Quashed—Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 1 (1)—Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c. 64), s. 2.

Conviction quashed on a count of an indictment charging conspiracy corruptly to obtain money, on which there had been no misdirection, by reason of misdirection on other counts charging one defendant with the corrupt obtaining of lesser sums of money which were part of the sum referred to in the count for conspiracy.

Appeals against conviction.

The appellants were both convicted at the Central Criminal Court on March 11, 1948, of conspiracy corruptly to obtain money, and the appellant Dickinson was further convicted on two counts charging the corrupt obtaining of money. They were sentenced by the Common Serjeant, Dickinson to a fine of £500 and De Rable to a fine of £300.

The appellant Dickinson was deputy-director of engine production in the Ministry of Aircraft Production during the

1948.
July 9.

GEORGE
TAUNT
DICKINSON.
KATHERINE
VERONICA
MANTON
DE RABLE.

Humphreys,
J.,
Birkett, J.,
Pritchard, J.

recent war, and the appellant De Rable was his driver. In the course of their duties they visited a company at Walsall named Green and Faulconbridge, Ltd., which manufactured small tools, and sums totalling £600 were paid by that company to the appellants. The case for the prosecution was that Dickinson persuaded a representative of the company, under a threat that otherwise it would not be good for his company, to pay a commission on all orders coming to his company from two other companies, and that £600 was so paid to the appellants, of which Dickinson himself received sums of £85 and £200. The case for the defence was that the £600 represented an innocent commercial commission and that neither of the appellants had acted corruptly. Count 1 of the indictment charged both appellants with conspiring corruptly to obtain the £600 from the company as an inducement to the appellant Dickinson to show favour, or forbear from showing disfavour, to the company in relation to the affairs of the Ministry. Counts 2 and 3 charged the appellant Dickinson alone with corruptly obtaining £85 and £200 respectively from the company as a like corrupt inducement. The Common Serjeant directed the jury (a) as regards all three counts, that if the appellant Dickinson was using his position as an important person in the Ministry to obtain commission corruptly, it did not matter whether the work in relation to which he obtained it was work with which his duties brought him into direct contact or not; (b) as regards counts 2 and 3, the onus was on the appellant Dickinson to prove that the sums received by him were not received or given corruptly under section 2 of the Prevention of Corruption Act, 1916. The jury convicted both appellants on count 1, and the appellant Dickinson on counts 2 and 3 also.

By the Prevention of Corruption Act, 1906, s. 1 (1): "If any agent corruptly . . . obtains . . . from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do . . . any act in relation to his principal's affairs or business . . . he shall be guilty of a misdemeanour . . .".

By the Prevention of Corruption Act, 1916, s. 2: "Where in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906, . . . it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any government department or a public body by or from a person . . . holding or seeking to obtain a contract from His Majesty or any government department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved".

1948.
July 9.

GEORGE
TAUNT
DICKINSON.
KATHERINE
VERONICA
MANTON
DE RABLE.

Humphreys,
J.,
Birkett, J.,
Pritchard, J.

Serjeant Sullivan, K.C., and Hugh Forbes, for both appellants:

Both directions (a) and (b) amounted to misdirections. In the case of (a) the appellant Dickinson was not an agent within the meaning of the Prevention of Corruption Act, 1906. He was concerned with aeroplane engines and not with small tools, and therefore orders with regard to small tools were not within the scope of any agency of his, and he did not obtain anything as an agent of the Ministry. Any payments made to him or the appellant De Rable could not be payments to corrupt him in a duty which did not exist. In the case of (b) there was a clear misdirection on onus of proof. The onus remained on the Crown, because there was no evidence that the small tools company was "holding or seeking to obtain a contract from His Majesty or any government department or public body" within the words of section 2 of the Act of 1916, and the section, accordingly, had no application. Even if (a) be held not to amount to a misdirection, but the Court holds that the convictions on counts 2 and 3 must be quashed by reason of the misdirection in (b) affecting them, the conviction on count 1 ought not to stand, as the £600 therein referred to included the two sums of £85 and £200 which were the subject of counts 2 and 3 respectively, and the jury's finding on count 1 may well have

1948.
July 9.

GEORGE
TAUNT

DICKINSON.
KATHERINE

VERONICA
MANTON
DE RABLE.

Humphreys,
J.,

Birkett, J.,
Pritchard, J.

been based on their findings that the payments in counts 2 and 3 respectively were corrupt, which findings were based on a misdirection in law.

R. E. Seaton, for the Crown:

It is conceded that direction (b) relating to counts 2 and 3 was a misdirection, but it is submitted that, in view of the wide language of section 1 (1) of the Act of 1906, direction (a) relating to count 1 was correct, and it does not necessarily follow that in coming to a decision on that count the jury must have been influenced by the misdirection in law on the other counts.

PRITCHARD, J.: The case for the Crown at the trial was that in the course of his journeys the appellant Dickinson called at Walsall, where Green and Faulconbridge, Ltd., had their business, and persuaded Mr. Green to open a commission account in favour of the appellant De Rable under a veiled threat, that if he did not do that, it would not be a good thing for his company, and the commission which was to be paid under that agreement was commission payable on all orders coming to Green and Faulconbridge, Ltd., from the Rolls Royce Co. and Rotol Co. Green and Faulconbridge, Ltd., was a company which made small tools, and it is indisputable that they did get orders from the Rotol Co., and on those orders, in pursuance of the agreement which the prosecution suggested was induced by Dickinson, £600 was paid during a comparatively short period of time to an account which can conveniently be called the De Rable commission account. Some of the money was paid direct to the female appellant and some was alleged to have been paid to the male appellant for her. In all £600 was paid to the credit of that account, including the £85 and £200 which are the subject of the second and third counts.

In this appeal two points, and two points only, are argued on behalf of the appellants. The first point is that Dickinson was not an agent within the meaning of the Prevention of Corruption Act, 1906. The argument is put in this way. It

is said that Dickinson was concerned with engines and not with small tools and that therefore his interference with the small tools orders was not within the scope of his agency. Serjeant Sullivan put the matter in a very small compass in his contention that Dickinson had no duty relating to small tools, and that therefore any payments made to him or to the other appellant at his instigation could not be payments to corrupt him in a duty which did not exist. With regard to that contention, the Court takes a different view. In the view of the Court there was evidence that, within the words of section 1 (1) of the Act of 1906, Dickinson, being an agent, corruptly obtained from Green for the appellant De Rable money as an inducement for forbearing to do an act in relation to his principal's affairs, those affairs being the purchase by the Rotol and Rolls Royce companies of small tools. In the judgment of this Court, the words which were used by the learned Common Serjeant in his summing-up were well-chosen, and the Court agrees with them. Those words were: "But still, members of the jury, if Dickinson was using his position as an important person in the Ministry of Aircraft Production to get commission corruptly, I do not think it would matter—it is a question for your consideration, but I do not think it would necessarily matter—whether the work in relation to which he was to get commission was work which his duties brought him into direct contact with or not". In the judgment of the Court, the words of section 1 of the Act of 1906 are designedly very wide, and it would be undesirable in the extreme to narrow their meaning in the way which would be necessary if the argument on this first point were held to be valid. The Court does not take that view, and on the first point in this appeal the Court is against the argument put forward by Serjeant Sullivan.

With regard to the second point, the matter stands in a very different position. It is alleged that there was in the summing-up by the learned Common Serjeant a misdirection on the subject of onus of proof. [His Lordship read section 2 of the Act of 1916 and continued.] It is clear from this section

1948.
July 9.

GEORGE
TAUNT
DICKINSON.
KATHERINE
VERONICA
MANTON
DE RABLE.

Humphreys,
J.,
Birkett, J.,
Pritchard, J.

1948.
July 9.

GEORGE
TAUNT
DICKINSON.
KATHERINE
VERONICA
MANTON
DE RABLE.

Humphreys,
J.,
Birkett, J.,
Pritchard, J.

that if certain matters are proved in evidence by the prosecution, the burden is placed upon the defence of proving that the payments or gifts were not made, given, or received corruptly. The learned Common Serjeant told the jury that with regard to the two counts in which Dickinson was charged alone, that is, the second and third counts of the indictment, the onus was on him to prove that the gifts or sums of money which he did receive were not received and given corruptly. It is now conceded by the prosecution through Mr. Seaton that that was a misdirection because there was no evidence that Green and Faulconbridge, Ltd., were persons who were holding or seeking to obtain contracts from His Majesty or from a government department. Indeed, the evidence was the other way, and therefore, in those circumstances, one of the essential elements required by section 2 of the Act of 1916 is absent, and the onus of proof never ought to have been shifted and ought always to have been on the prosecution. In these circumstances, the Court without any hesitation has come to the conclusion that the convictions on counts 2 and 3 cannot stand and must be quashed.

The remaining and more difficult question is whether this decision should have an adverse effect on the conviction on count 1. In all £600 was obtained from Green and Faulconbridge, Ltd., as the result of the alleged conspiracy, and that £600 included the two payments of £85 and £200 which were the subject of the second and third counts. As the jury were wrongly told with regard to those two payments that the onus was on the one defendant who was concerned in counts 2 and 3 to establish that they were not obtained corruptly, the Court cannot be certain that the jury, in coming to their decision on count 1, did not act on the very two payments which, having regard to the misdirection, can no longer be said to have been proved to be corrupt. In those circumstances the Court has come to the conclusion that it is impossible to separate the various payments from the results of the misdirection which admittedly existed in respect of

two of them. That being so, the conviction on count 1 must also be quashed, and in the result this appeal is allowed.

Conviction quashed.

Solicitors: Holt, Beevor & Co., for appellants.

1948.
July 9.

GEORGE
TAUNT
DICKINSON.
KATHERINE
VERRONICA
MANTON
DE RABLE.

Humphreys,
J.,
Birkett, J.,
Pritchard, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SINGLETON
AND MR. JUSTICE SLADE.

1948.
July 12.

GARMONYDD VINCENT JONES.

Indictment—Counts for Fraudulent Conversion and Larceny—Plea of Guilty to Counts for Fraudulent Conversion and Not Guilty to Counts for Larceny—Plea Accepted—No Evidence of Fraudulent Conversion—Evidence of Larceny by a Trick—Conviction Quashed—No Order that Counts for Larceny Should be Tried.

The appellant, on being arraigned on an indictment containing counts for fraudulent conversion and larceny, pleaded Guilty to the counts charging fraudulent conversion and Not Guilty to the counts charging larceny and those pleas were accepted. There was in fact no evidence of fraudulent conversion, but evidence on which the appellant might have been convicted of larceny by a trick.

Held, that, in the circumstances of the case, the Court would merely quash the conviction and would not order the counts of larceny to be tried.

Appeal against sentence.

The appellant pleaded Guilty at Lancashire Quarter Sessions on April 14, 1948, to fraudulent conversion and was sentenced by the Chairman to eighteen months' imprisonment.

The indictment contained five counts. The first charged the prisoner with larceny of £3; the second with fraudulent

1948.
July 12.

GARMONYDD
VINCENT
JONES.

Goddard,
L.C.J.,
Singleton, J.,
Slade, J.

conversion of the same sum of £3 entrusted to him for the purpose of decorating a house; the third count charged him with larceny of a sum of money; the fourth with fraudulent conversion of the same sum entrusted to him for a similar purpose; and the fifth with larceny. The appellant was assigned counsel, and on counsel's advice pleaded Not Guilty to the counts which charged larceny, but Guilty to the counts which charged fraudulent conversion.

No counsel appeared.

THE LORD CHIEF JUSTICE: The Court, having read what took place at quarter sessions, has sent for the depositions and in the opinion of the Court there was no case whatever of fraudulent conversion, although the appellant might very well have been convicted of larceny by a trick. Apparently he is a sign painter and he went to the first person whose property he has pleaded guilty to fraudulently converting and offered to decorate a room in her house. She agreed to his doing it, and he then said he wanted some money with which to buy paint. He quoted a price and asked for money on the ground that he had not any himself, so she advanced him money for the purchase of paint against the sum which she was agreeing to pay for the painting of the room. The other case was very similar, except that there the appellant offered to do some sign-printing on a van. Then the appellant said that he would have to buy some plywood and the person for whom the work was going to be done also paid him in advance. The appellant did not buy the plywood and did not do the work. These are simply cases of a man representing that he was willing to do some work, getting payment in advance, and then not doing it. If the case had been tried before a jury there was abundant evidence on which a jury could have found him guilty of larceny by a trick in both cases, because if the jury came to the conclusion, as they very well might, and probably would, have done, that the appellant never intended to work at all but, having been paid the money in

advance, put it into his pocket and spent it, that would amount to larceny by a trick.

There was no fiduciary relationship here. It cannot be said that the money remained the money of the persons who gave it to the appellant, and he could not therefore be guilty of fraudulently converting it to his own use. On the money being handed to the appellant, it was his money. The fact that he did not do what he ought to have done only shows that he was a dishonest person in telling people that he was going to do work and then not doing it. The appellant is in exactly the same position as a welshing bookmaker. Why the welshing bookmaker is held guilty of larceny is that when he receives the punter's stake he does not intend to pay out if he loses, but simply to appropriate the money and run away with it. The appellant ought never to have been advised to plead guilty to fraudulent conversion and the Court ought never to have accepted that plea. It was a case of larceny or nothing.

The consequence is that the appellant pleaded guilty to an offence which he did not commit, and not guilty to an offence of which he might have been convicted, and those pleas were accepted. It might be possible for the Court to send the case back to be tried on the counts to which the appellant pleaded Not Guilty, because there never has been a verdict on those counts, but the Court does not see fit to do that. The appellant has been in custody since April 13. In the circumstances the only thing which the Court can do is to order the appellant to be discharged.

Conviction quashed.

1948.
July 12.

GARMONYDD
VINCENT
JONES.

Goddard,
L.C.J.,
Singleton, J.,
Slade, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SINGLETON
AND MR. JUSTICE SLADE.

PETER ERIC GREEN.

1948.
July 12.

Sentence—Borstal Detention—Failure to Submit to Medical Examination under National Service Acts—No Evidence of Criminal Habits or Tendencies—Sentence of Imprisonment Substituted—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 1 (1).

Sentence of imprisonment substituted for a sentence of Borstal detention in the case of a youth convicted of failing to submit himself for medical examination, contrary to section 3 of the National Service (Armed Forces) Act, 1939, and the National Service Act, 1941.

Appeal against conviction and sentence.

The appellant was convicted at Essex Quarter Sessions on June 3, 1948, of failing to submit to a medical examination, contrary to section 3 of the National Service (Armed Forces) Act, 1939, and the National Service Act, 1941, and was sentenced by the Chairman to three years' detention in a Borstal Institution.

J. Gross, for the appellant:

The appeal is directed to sentence only. A sentence of Borstal detention was not appropriate in this case, because the appellant was not a young man of criminal habits or tendencies. It is submitted that a short sentence would be more appropriate.

W. M. F. Hudson, for the Crown.

SINGLETON, J.: In our view this was not a case in which a sentence of detention in a Borstal institution ought to have been passed, even though the appellant is very young and Borstal might be a suitable place for training him. We do

not regard him as within the terms of section 1 (1) of the Prevention of Crime Act, 1908, because he is not, in our view, a person of criminal habits or tendencies in that sense. He has, however, committed a serious crime against the State. The National Service Act, 1941, s. 4 (2), provided that a person "who fails to submit himself for examination in accordance with any such order shall be guilty of an offence under the principal Act, and liable (a) on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine not exceeding £100, or to both such imprisonment and such fine, or (b) on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £50, or to both such imprisonment and such fine". It is to be observed that the appellant elected to go for trial; otherwise he might have been dealt with summarily. Mr. Gross, who submitted to the Court that this was not a case for Borstal detention, added that the Court might deal with the matter by a short sentence. No doubt the Court could do so. Whether any Court ought to do so when a youth of eighteen years of age adopts the attitude which this appellant has done is at least questionable.

When the appellant had been convicted before the Court of quarter sessions, the learned Chairman, who was obviously troubled as to what should be done, asked him: "What is your attitude about this? What are you going to do? What is at the back of your mind? You cannot disobey Acts of Parliament, you know, any more than I can or anybody else (Peter Eric Green): I consider that the National Service Act was imposed by the Government as a step towards bringing another war about". The learned Chairman put further questions and said: "Will you register as a conscientious objector? (Peter Eric Green): It is evading the issue of conscription. I also object to the Government. (The Chairman): In other words you, at eighteen years of age, are going to set yourself in defiance of Acts of Parliament which bind all of us. That is your attitude, is it? (Peter Eric Green): It is not. If the National Service Act was the will of the

1948.
July 12.

PETER ERIC
GREEN.

Goddard,
L.C.J.,
Singleton, J.,
Slade, J.

1948.
July 12.

PETER ERIC
GREEN.

Goddard,
L.C.J.,
Singleton, J.,
Slade, J.

majority, large numbers of people would be flocking to the Forces". The Chairman then said to him in a kindly manner: "Green, I am an older man than you are. Are you going to be sensible and be medically examined? If so, we will help you, but if not we shall deal with you. (Peter Eric Green): I am not going to accept the National Service Act. (The Chairman): You are not going to? (Peter Eric Green): No".

That is as clear and as deliberate a defiance of Parliament as there has ever been. The appellant declined to be medically examined. He was convicted of an offence against the statute. The Court wondered what should be done with him. They gave him every possible chance, but still he would do nothing. In such a case the view of this Court is that it would not be right to pass a nominal, or a very short, sentence. Others might think that the defiance of an Act of Parliament means nothing, and this appellant must learn that it is his duty as a citizen of this country to obey Acts of Parliament. If he does not and if he continues to set them at defiance, it is the duty of some Court to show him that it is wrong. In place of the order for Borstal detention the Court substitutes a sentence of twelve months' imprisonment.

Sentence varied.

Solicitors: Hayes, Pollard & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BYRNE.

ERNEST BEDFORD.

1948.

Oct. 13.

*Sentence—Time to Count—Application Coming before Single Judge
—Decision by Single Judge Ordinarily to be Considered as
Governing Date—Criminal Justice Act, 1948 (11 & 12 Geo. 6,
c. 58), s. 38 (2).*

Section 38 (2) of the Criminal Justice Act, 1948, provides that six weeks or less of the time during which an appellant is specially treated as an appellant shall be disregarded in computing his sentence.

Where an application for leave to appeal has come before a single Judge and has been refused and the appellant has desired that the case shall be further considered by the full Court, and the full Court also has refused the application, the date of the decision by the single Judge will ordinarily be considered the governing date for the above purpose, and any time which elapses between the refusal of the application by the single Judge and its refusal by the full Court will not count as part of the sentence.

Application for leave to appeal against conviction.

The applicant was convicted at Leeds Assizes on July 5, 1948, of storebreaking and larceny and was sentenced by Stable, J., to three years' penal servitude. His notice of appeal was dated July 17, and the application for leave to appeal was refused by the single Judge (Slade, J.) on August 17. He then applied for leave to appeal to the full Court.

No counsel appeared.

THE LORD CHIEF JUSTICE [after stating that the application must be refused]: Section 38 (2) of the Criminal Justice Act, 1948, provides that six weeks or less of the time during which an appellant to this Court is specially treated shall be

1948.
Oct. 13.

ERNEST
BEDFORD.

Goddard,
L.C.J.,
Humphreys,
J.,
Byrne, J.

disregarded in computing the term of his sentence. This means in effect that where a convicted person gives notice of appeal or makes application for leave to appeal the time spent in prison does not count as part of his sentence if the application or appeal is heard and dismissed within six weeks. If the hearing does not take place till after six weeks have expired from the date of the notice, and if the appeal or application is dismissed, any time that the convicted person has spent in prison over six weeks will be counted as part of his sentence. It may, however, be that his application for leave to appeal has come before a single Judge of the Court and been refused, and the applicant has desired that the case should be further considered by the full Court. In that case it must be understood that the date of the determination by the single Judge will ordinarily be considered the governing date for this purpose. The time that must elapse between the refusal of the application by the single Judge and the refusal of the application by this Court will not count as part of the sentence, for the fact that the application has already been dealt with and refused by the single Judge will ordinarily be considered a good reason for the Court exercising the discretion which the section gives it.

In this particular case the applicant applied for leave to appeal on July 17. He would then be specially treated in prison as an appellant. His application was considered by Slade, J., on August 17, less than six weeks from the date of the notice, and he would, therefore, not be entitled to have any part of the time during which he was waiting treated as part of his sentence. He was not content with Slade, J.'s refusal, and has applied to this Court, which has refused his application. Consequently no part of the time from August 17 to October 13 can be allowed to count, as the applicant ought to have been content with the learned Judge's refusal on August 17.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BYRNE.

VINCENT NICHOLAS O'NEILL.

1948.
Oct. 18.

Sentence — Borstal Detention — Prisoner Already Undergoing or Liable to Undergo such Sentence — Fresh Sentence — Direction when Sentence to Begin not to be Given.

Where a sentence of Borstal detention is imposed on a prisoner who is already undergoing or is liable to undergo such a sentence, the Court should not give any direction as to when the sentence which it imposes should begin.

Reference by the Home Secretary under section 19 (b) of the Criminal Appeal Act, 1907.

The appellant pleaded guilty at Cheshire Quarter Sessions on July 5, 1948, to housebreaking and larceny, and asked for thirty-two other offences to be taken into consideration. He was sentenced by the Chairman to three years' detention in a Borstal institution, and the sentence was drawn up so as to commence at the expiration of a similar sentence imposed on him on July 25, 1946. He had been released from that earlier sentence in September, 1947, on a licence which expired on July 25, 1949.

No counsel appeared.

THE LORD CHIEF JUSTICE: This matter has been referred to the Court by the Secretary of State under section 19 (b) of the Criminal Appeal Act, 1907, which provides that the Secretary of State may, if he thinks fit on considering any petition, "if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and

1948.
Oct. 18.

VINCENT
NICHOLAS
O'NEILL.

Goddard.
L.C.J.,
Humphreys,
J.,
Byrne, J.

the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly". Under the Rules, the opinion of the Court may be furnished to the Secretary of State either by giving judgment in open Court and sending a copy of the judgment, or privately. As this case raises a point of importance to quarter sessions, we think that it would be desirable to give our opinion in public.

Ths facts are that the appellant pleaded guilty at the last Summer Cheshire Quarter Sessions to housebreaking, and he asked for thirty-two other cases to be taken into account. He had been previously before a Court of quarter sessions and sentenced to Borstal detention for a period not exceeding three years. After one year he had been released by the Commissioners on September 4, 1947, on a licence which expires in July, 1949. On his release he had gone into the Army but was discharged from the Army after one month for reasons which are immaterial for us to consider, and then he started on this career of crime. The quarter sessions of Cheshire ordered a sentence of Borstal detention for a period not exceeding three years, and the Chairman said: "Taking into account the high number of other offences involved, you will be sent to a Borstal institution for three further years. That means to say the sentence will run from today and you will have to serve your sentence". The sentence was drawn up so that it was to commence at the expiration of the sentence imposed upon him on July 25, 1946, so presumably the Court meant that the prisoner was to serve the remaining term of his first sentence and then begin a further term of detention.

Now it has to be remembered that under the statute which regulates Borstal detention and gives the power to impose a sentence of Borstal detention (the Prevention of Crime Act, 1908), it is left entirely to the Commissioners of Prisons to decide when the prisoner may be discharged. That is why the sentence is always framed as a sentence of detention not exceeding three years in a Borstal institution. As is well known, it is very seldom indeed that prisoners are not released considerably before the expiration of three years from the date

of the sentence. They are released when, in the judgment of the Commissioners, their conduct shows that there is a reasonable chance of their going straight and therefore they may be released on licence. If they commit another offence, they can then, as no doubt has happened in this case, be re-taken and will have to continue to serve the unexpired portion of their sentence, or such part of it as the Commissioners in their discretion think fit.

If, therefore, a Court orders that a sentence of Borstal detention be passed upon an offender who is already on licence, and orders that sentence to take effect at the expiration of the earlier sentence, no one can say for what period it will or it will not take effect because the expiration of the sentence is entirely in the hands of the Commissioners. They may release this appellant—I am not saying they will—after serving a further three months. Then, if the new sentence is to take effect, they can release him again on that immediately.

We think, therefore, that the right advice to give to the Home Secretary is that a sentence in this form is not an appropriate sentence and ought not to be passed with the addition of these words, and that, therefore, the sentence should be regarded as though the words “at the expiration of the sentence imposed upon him on the 25th July, 1946”, were eliminated. We do that for the reason, as I say, that it creates a situation not only of difficulty but one which it would really be impossible to reconcile with the statute under which Borstal detention is imposed. Therefore, I hope it will be noticed by quarter sessions that it is not desirable or indeed possible to give any directions in the case of a sentence of Borstal detention as to when the sentence should begin if the prisoner is already undergoing or liable to undergo a sentence of Borstal detention.

1948.
Oct. 18.

VINCENT
NICHOLAS
O'NEILL.

Godard,
L.C.J.,
Humphreys,
J.,
Byrne, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JONES
AND MR. JUSTICE BYRNE.

DEREK CLAYTON-WRIGHT.

1948.
Oct. 15.

Indictment—Joinder of Counts—“Part of a Series of Offences of the Same or a Similar Character”—Arson and False Pretences—Nexus of Defrauding Insurers Present Throughout—Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), Sched. I, r. 8.

The appellant was convicted on an indictment containing four counts. The first charged him with arson, contrary to section 42 of the Malicious Damage Act, 1861, in that he unlawfully set fire to a vessel. The second count charged him with arson of the vessel with intent to prejudice the insurers, contrary to section 43 of the same Act. The third count charged him with attempting to obtain money by false pretences from the insurers in respect of the policy of insurance on the vessel, and the fourth count charged him with obtaining money by false pretences from other insurers by pretending that a mink coat had been stolen from his motor car and that he was entitled to payment under the policy in respect of the alleged loss.

Held, that as the charges contained in the first three counts were in substance charges of firing the vessel with the intention of defrauding underwriters, and the charge contained in the fourth count was a similar charge of defrauding underwriters, the nexus of fraudulent acts to the prejudice of underwriters was present throughout so as to constitute the charges “part of a series of offences of the same or a similar character” within the meaning of rule 3 of the rules in Schedule I to the Indictments Act, 1915, and the counts were, accordingly, properly joined in one indictment.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on July 25, 1948, of arson, arson with intent, and attempting to obtain money by false pretences and was sentenced by Humphreys, J., to three years’ penal servitude.

The indictment contained four counts. The first count charged the appellant with arson contrary to section 42 of

the Malicious Damage Act, 1861, in that on March 2, 1948, at Southampton, he unlawfully and maliciously set fire to a vessel, namely, *The Barcarolle*. The second count charged him with arson with intent, contrary to section 43 of the same Act, the particulars being that on the same day and at the same place he unlawfully and maliciously set fire to the vessel with intent thereby to prejudice the members of the Institute of London Underwriters who had underwritten a policy of insurance on the vessel. Both of those charges are felonies. In the third count he was charged with misdemeanour, attempting to obtain money by false pretences, the particulars being that on the same day and at the same place with intent to defraud he attempted to obtain from the members of the Institute of London Underwriters who had underwritten a policy of insurance on this vessel payment for the total loss of the vessel by falsely pretending it had become a total loss by reason of an accidental fire on board and that he was then entitled to payment under the policy. The fourth count, also for misdemeanour, charged him with obtaining money by false pretences in that on a day in June, 1947, with intent to defraud, he obtained the sum of £400 from the Royal Insurance Co., Ltd., by falsely pretending that a mink coat had been stolen from his motor car and that he was then entitled to payment of the sum under a policy of insurance. The appellant was convicted on the first three counts, and acquitted on the last.

1948.
Oct. 15.

DEREK
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

J. Scott Henderson, K.C., and *J. T. Molony* for the appellant :

The inclusion of the fourth count in the indictment was a misjoinder which rendered the indictment defective. Before the Indictments Act, 1915, it would have been impossible to join counts for felony and misdemeanour. This has now been rendered possible by s. 4 of the Act, but the circumstances in which joinder is now possible are defined in rule 3 of the rules contained in the First Schedule to the Act. Joinder is permitted only where the charges are founded on the

1948.
Oct. 15.

DEREK
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

same facts, or form or are a part of a series of offences of a similar character. The facts relied on to support the fourth count were wholly different from those relating to the first three counts, and the offences were not of a similar character. All the first three counts related to the firing of the ship and false pretences made in relation thereto; the fourth count related to a false pretence in relation to the alleged loss of a mink coat from a motor car. The underwriters were different and the policy was different. Further, even if it be held that the inclusion of the fourth count did not amount to a misjoinder, the Judge should, in the exercise of his discretion, have ordered the fourth count to be tried separately. Moreover, the direction contained in the summing-up was not satisfactory.

G. D. Roberts, K.C., and Cyril Williams for the Crown, were not called on to argue.

THE LORD CHIEF JUSTICE: Three points have been taken on behalf of the appellant in respect of this appeal. The first point is that the indictment was defective and so defective that no judgment could be based upon it in that there was a misjoinder of the fourth count, which, it is submitted, ought not to have been included in the indictment at all, and, therefore, the indictment was bad. The second point is that there ought to have been a separate trial with regard to the fourth count, and the third point is misdirection. I pause for a moment to say that the appellant was convicted upon counts one, two and three, and upon the fourth count, which it is submitted was wrongly joined and with regard to which it is said that there ought to have been a separate trial, he was acquitted.

The first question we have to decide is whether the fourth count was rightly joined in the indictment. Before the Indictments Act everybody who was in practice before 1915 will remember that if a grand jury—because in those days and until 1933 all indictments were preferred by grand juries—preferred an indictment containing a charge of felony and

a charge of misdemeanour, that indictment was bad, and the Court upon the objection being taken, whether taken by demurrer or mere objection, would have quashed the indictment. There was nothing clearer in the criminal law in those days than that a charge of felony and a charge of misdemeanour could not be included in the same indictment, and if it were, the only remedy which the prosecution could have would be by asking the grand jury to prefer another indictment either for felony alone or for misdemeanour.

Now when we come to the Indictments Act of 1915, the main object of which was to simplify the whole system of criminal procedure so far as criminal pleadings were concerned, it is abundantly clear that the legislature intended that technical objections, which did not go to the substance or merits of the case, should as far as possible be swept away. Accordingly, by section 4 of the Act it was provided: "Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies". In pursuance of the provisions of the Act, rules were made, and by rule 3 it is provided: "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character".

Before dealing with the indictment in this case, I should remark that by section 5 of the Indictments Act it was provided: "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without

1948.
Oct. 15.

DEBBE
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

1948.
Oct. 15.

DEREK
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit". Subsequently in 1933 by s. 2 (3) of the Administration of Justice (Miscellaneous Provisions) Act provision is made for saying one count in the indictment can be quashed and the rest of the indictment stand. I am far from saying, and I do not intend to say, that if an indictment which is preferred is defective in that it does not comply with the provisions of section 4 of the Indictments Act and the rules made thereunder and is left unamended until after verdict, that the indictment then can be supported. In my judgment if the indictment is defective and remains defective until judgment, it may be a ground for arresting the judgment after verdict. This can be decided if and when the point arises. No application was made to amend; Mr. Roberts, who appeared for the Crown, stood upon the indictment and submitted it was a good indictment. Therefore, we have to consider whether this was an indictment in which count four was properly included. Again I say it makes no difference for this purpose that the appellant was acquitted on count four. If it was a bad indictment, it was bad *ab initio*, and this sort of point is not one of those points which is cured by the verdict.

If we take the indictment, it is perfectly clear that count two can be joined with count one; they were both felonies and they both relate to the same set of circumstances. Count three, which was for misdemeanour, can also be joined with count two, and it follows with count one also, although those are felonies, because they relate to exactly the same set of facts. We now come to count four, which relates to a charge of obtaining by false pretences a sum of money from underwriters on another policy of insurance, different altogether from that which was dealt with in the second and third counts. It is said that because that count deals with a mink coat which was insured under a very different policy from a policy on a ship, there was a bad joinder and that it cannot come within the words "if those charges are founded

on the same facts, or form or are a part of a series of offences of the same or a similar character ”.

One test which the learned Judge has told us he applied in this matter was whether or not the evidence with regard to the mink coat could be given in evidence upon the other charges. He came to the conclusion that it could be, and in the opinion of the Court he came to a right conclusion on that point. First, because evidence was given by the prosecution that there had been a discussion between the appellant and other persons with regard to the desirability or possibility of firing the ship to get money out of the underwriters, and that the appellant referred to this incident of the fur coat as showing how easy it was to get money out of underwriters. That was one ground, but in my opinion it is not the firmer ground upon which this can be put.

With regard to the charge contained in the three counts, although the first count simply charges arson and not the attempt to get money, in substance this case was a case in which it was alleged that the appellant fired this yacht with the idea of swindling underwriters. The charge with regard to the mink coat was a similar charge of swindling underwriters, and, therefore, there is the nexus of the fraudulent acts to the prejudice of the underwriters going through the indictment as a whole, or certainly through counts two, three and four, and in the opinion of the Court that is sufficient to uphold this indictment because we think that the matter comes within the words of rule 3, that the charges “are a part of a series of offences of the same or a similar character ”. They were similar in the sense that both charges were charges of swindling underwriters. That is the ground upon which the Court holds that there was no misjoinder.

With regard to the point that there ought to have been separate trials on count four and the other three counts, in the opinion of the Court there is nothing in that point at all. In the first place, we have laid down on more than one occasion that whether or not there should be separate trials of the prisoners or separate trials of counts against the same

1948.
Oct. 15.

DEREK
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

1948.
Oct. 15.

DEREK
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

prisoner is a matter for the discretion of the learned Judge who tries the case. In *GRONDKOWSKI AND MALINOWSKI*, [1946] K. B. 369, 31 Cr. App. R. 116, the Court was reviewing the whole law on the subject and dealt with the cases over a long period, and in summing-up the result the Court said (at pp. 374 and 122 of the respective reports): "The real test, after all, which must be applied by a Court of Criminal Appeal on a matter which is essentially one of discretion is, has the exercise of the discretion resulted in a miscarriage of justice". Now it is abundantly clear that the joinder in the present case could not have resulted in a miscarriage of justice in this case, for two reasons. It is conceded, we think, and if it is not conceded, we hold, that the evidence which was given with regard to the mink coat was admissible evidence on counts two and three, and, that being so, there cannot be any miscarriage of justice or prejudice to the appellant from the fact that it was made the subject of an independent and separate count. The evidence relating to it was given and could be given. The other reason why it is abundantly clear that there has been no miscarriage of justice is because the appellant was acquitted on that count, and, indeed, the learned Judge has reported to this Court that one reason why he thought it desirable that the evidence should be given was to show that it was thoroughly weak, and, indeed, related to a flimsy case for which there was no real foundation. Therefore, it was in the appellant's favour that that should be brought out, and the Judge charged the jury to pay no attention to it whatever, because, as he said, no jury could possibly have convicted the appellant on the evidence which was before them on the charge of swindling underwriters in respect of that mink coat. Therefore, in the opinion of the Court there is nothing in the second point.

The third point in the case raises the question of misdirection. I have often wondered whether any criminal case lasting over two or three hours has ever yet been tried by a Judge, even a Judge most experienced in criminal matters, in which it is not possible to come before this Court

and raise some question of misdirection. Misdirection is said to exist not only in an active misstatement of evidence or of law but in failure to direct a jury on a point on which they ought to receive direction. But that does not mean that a Judge at the end of a long criminal trial is to go meticulously through the evidence and refer to every point which has been made in the case or recapitulate the arguments of counsel for the prosecution or for the defence and point out in respect of each argument which is used what the evidence is for or against it. The duty of the Judge in any criminal trial, or, for the matter of that, in any civil trial, is adequately and properly performed if he gives the jury an adequate direction on the law, an adequate direction upon the regard they are to have to particular evidence on such matters as accomplices or matters which require by law or practice corroboration, and if he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else.

His Lordship then referred to the summing-up in detail, and continued: In the opinion of the Court there was no misdirection, there was a perfectly fair trial, a full and proper summing-up in which the defence was adequately placed before the jury, and the jury came to a verdict which in the opinion of this Court was a right verdict.

The appeal is dismissed.

Appeal dismissed.

1948.
Oct. 15.

DEREK
CLAYTON-
WRIGHT.

Goddard,
L.C.J.,
Jones, J.,
Byrne, J.

Solicitors: Wrentmore & Son, agents for Phillip, Evans & Insley, Bournemouth, for appellant; Sharpe, Pritchard & Co., agents for R. R. H. Meggeson, Town Clerk, Southampton, for the Crown.

LINCOLNSHIRE AUTUMN ASSIZES

BEFORE

MR. JUSTICE BYRNE

1948.
Nov. 5.

THOMAS MADDISON AND OTHERS

Indictment—Committal for Trial—Committal on Commission Day of Assizes—Invalidity—Fresh Indictment Preferred by Leave of Judge—Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 27—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36), s. 2 (2)—Indictments (Procedure) Rules, 1933 (S. R. & O., 1933, No. 745/L22), R. 6 (3).

A committal to assizes on the Commission Day of the same assizes is bad, in that it will deprive the prisoner of his right under section 27 of the Indictable Offences Act, 1848, to a copy of the depositions “before the first day of the assizes”.

MURRAY (1935), 25 Cr. App. R. 129, considered.

Motion to quash indictment and application for leave to prefer fresh indictment.

On November 3, 1948, which was the Commission Day of Lincolnshire Autumn Assizes, Thomas Maddison and two other persons were committed for trial to the Assizes by the Grimsby Borough Justices on charges of housebreaking and larceny, and an indictment was preferred and signed by the Clerk of Assize charging them with the same offences.

James Macmillan, for the prosecution :

It is submitted that this indictment must be quashed on the ground that there has been no valid committal for trial. A committal to assizes on the Commission Day for those assizes has generally been regarded as being bad. There is no express authority on the point, but in MURRAY (1935) 25 Cr. App. R. 129, *du Parcq, J.*, who was the Judge of first instance said (at p. 135): “I will say quite frankly that I have granted on other

circuits applications made to me during the pendency of an assize for leave to prefer a bill of indictment based upon a committal by justices. I am not sure whether that was a right course to take, but I am satisfied that justices ought not to commit to any assizes which have already begun, for the reason that, if they do so, they are depriving the accused person of his rights under the Act of 1848". The reference is to s. 27 of the Indictable Offences Act, 1848, under which "at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions, or other first sitting of the Court at which any person so committed to prison or admitted to bail . . . is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same . . .". Application is made in the present case for leave under s. 2 (2) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to prefer a fresh bill of indictment in respect of the offences charged in the present indictment. Rule 6 (3) of the Indictments (Procedure) Rules, 1933, clearly envisages such leave being given in a case where there has been a committal for trial, and specifies the form in which the application is to be made in that case.

None of the prisoners was represented.

BYRNE, J., ruled that the committal was bad, on the ground that a committal to assizes on the Commission Day of those assizes would deprive the accused person of his rights under s. 27 of the Indictable Offences Act, 1848, and that the indictment must accordingly, be quashed. He said that in such a case committing justices ought to remember their powers under s. 14 (1) of the Criminal Justice Act, 1925, as amended by s. 6 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, of committal to some other convenient assizes, and consider whether such powers ought to be exercised. In the present case, he would grant leave for a

1948.
Nov. 5.

THOMAS
MADDISON
AND OTHERS.

Byrne, J.

1948.
Nov. 5.

THOMAS
MADDISON
AND OTHERS

Byrne, J.

fresh bill of indictment to be preferred, on an application in the form prescribed by the rules being submitted to him.

Indictment quashed.

Solicitor: L. W. Heeler, Grimsby, for the prosecution.

A fresh bill of indictment was accordingly preferred and signed, and the prisoners all pleaded guilty to it on a later day at the same assizes before FINNEMORE, J., and were sentenced by him.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE LEWIS
AND MR. JUSTICE JONES.

JAMES LEONARD JONES.

1948.
Oct. 25;
Nov. 2.

Summing-up—Accessory after the Fact—Acts Done to Assist Felon to Escape Conviction to be Specified—Possible Motive to Evade Own Arrest—Conviction Quashed.

The appellant was charged, together with his wife and another person, on a number of counts charging the receiving of stolen property. On all these counts he was acquitted. He was convicted on six counts of the same indictment as an accessory after the fact to those felonies of which his wife was convicted. The only evidence against the appellant on these last-named charges consisted of his words and conduct when interviewed by the police. The only reference by the Assistant Recorder in his summing-up to the charges of being accessory after the fact was in the following terms: "An accessory after the fact is one who, knowing that another person has been guilty of felony, takes some active step to conceal the felony and to prevent the apprehension of the felon, and if it is material, you will have to consider whether Jones' conduct was that of a man taking active steps to conceal a felony by Mrs. Jones, assuming, of course, that you think Mrs. Jones was guilty of receiving".

Held, that the summing-up was so inadequate as to necessitate the quashing of the conviction, and that the Assistant Recorder should have specified the "active steps" by the appellant on which the prosecution relied as constituting an attempt by him to prevent the apprehension of his wife, and should further have directed the jury that, if they thought his evasions and mistakes may have been due to a desire to evade his own arrest on the charges of receiving and not to a desire to prevent the apprehension of his wife, that would be insufficient to bring him within the purview of the charges of being an accessory after the fact.

Direction in *LEVY*, 7 Cr. App. R. 61; [1912] 1 K. B. 158, approved.

1948.
Oct. 25;
Nov. 2.

Appeal against conviction.

The appellant was convicted at Birmingham Quarter Sessions on June 30, 1948, on six charges of being accessory after the fact to the receiving of stolen property and was sentenced by the Assistant-Recorder to eight months' imprisonment.

JAMES
LEONARD
JONES.
—
Humphreys,
J.,
Lewis, J.,
Jones, J.

The indictment contained nine counts charging the appellant, together with his wife Elsie Jones and a man named Twist, with receiving stolen property. The appellant was acquitted on all these counts, but his co-defendants were convicted on some of them. The appellant was convicted on six counts charging him with being accessory after the fact to felonies of receiving committed by his wife. The only evidence against the appellant on the charges of being an accessory after the fact consisted of his actions and conduct when interviewed by the police, particulars of which appear in the judgment. The Assistant Recorder, in his summing-up, defined an accessory after the fact as being "one who, knowing that another person has been guilty of felony, takes some active step to conceal the felony and to prevent the apprehension of the felon", but did not specify to the jury the "active steps" on which the prosecution relied. The material portions of the summing-up appear in the judgment.

J. Silverman, for the appellant:

The grounds of this appeal are misdirection and non-direction. The Assistant Recorder failed to direct the jury on the question of what acts would make a person an accessory after the fact. The assistance given to the felon must be directed to trying to prevent the felon from being brought to justice. In *HANSILL* (1849), 3 Cox C. C. 597, at p. 599, Erle, J., said: "It appears to me that the distinction intended by Hale is that you cannot make a man an accessory from a bare receiving; there must be such a receiving as tends to assist the felon". Here, all the appellant did was to make untrue statements and the jury should have been told that it was for them to consider whether, in doing so, he was trying to prevent his own

arrest, or whether he was concerned with assisting his wife, and that if they thought the appellant's motive was the first-named or that the matter was left in doubt, they should acquit the appellant. [He referred also to ROWLEY (1948), 32 Cr. App. R. 147.]

1948.
Oct. 25;
Nov. 2.

JAMES
LEONARD
JONES.

Humphreys,
J.,
Lewis, J.,
Jones, J.

A. E. James, for the Crown :

The direction on the charges of being an accessory after the fact was adequate. It is agreed that, to render a person an accessory after the fact, he must do something to hinder the apprehension, trial or punishment of the felon. Although the appellant used words only, on his own admission those words were untrue, and that fact gives rise to the inference that he was thereby trying to dissuade the police from searching the premises where the stolen goods were and was thereby assisting his wife. It is submitted that words may constitute the act required to render a person an accessory after the fact.

Cur. adv. vult.

November 2.—The judgment of the Court was read by :

HUMPHREYS, J. : The Court is indebted to counsel in this case for the clear and concise arguments presented on both sides. The appellant appeals from his conviction by leave of the Court. He was indicted at the quarter sessions for the city of Birmingham. The indictment charged him in a number of counts, together with his wife Elsie Jones and a third party named Twist, with feloniously receiving a number of ladies' dresses, coats and similar articles proved to have been stolen between November, 1947, and May, 1948. Elsie Jones and Twist were convicted upon some of those charges and do not appeal. The appellant was acquitted upon all the counts against him charging receiving, but was convicted on six counts as an accessory after the fact to such of the felonies as the jury found were proved against his wife.

The counts were all in the same form, and each alleged that he was an accessory after the fact to receiving stolen goods in that he, well knowing that Elsie Jones had received certain

1948.
Oct. 25;
Nov. 2.

JAMES
LEONARD
JONES.

Humphreys,
J.,
Lewis, J.,
Jones, J.

property mentioned knowing it to be stolen, did between the date of that receiving and on dates thereafter receive, comfort, harbour, assist and maintain the said Elsie Jones. As an example, count 12 is in these words: "A twelfth count charges you, James Leonard Jones, with being an accessory after the fact to receiving stolen goods in that well knowing that Elsie Jones between the 27th day of April, 1948 and the 10th day of May, 1948 at Smethwick in the county of Stafford received 5 cream blankets—those are the items mentioned in the first count—the property of Jesse Harry Evans, knowing the same to have been stolen, you did between the said dates and on days thereafter receive, comfort, harbour, assist and maintain the said Elsie Jones". The dates alleged for the receiving varied according to the dates between which the prosecution alleged the goods to have been stolen. None of the counts therefore indicated any particular date as the date of the offence charged.

The appellant lived with his wife and daughter at 7 Upper Grove Street, Smethwick, a house containing several rooms, apparently all occupied by the appellant, his wife and daughter. On May 9, 1948, the police found at that house, in the living room downstairs, twenty-five ladies' coats and dresses on coat hangers attached to the picture rails, all new and nearly all bearing price tickets and labels. In the bedroom occupied by the appellant and his wife they found a considerable amount of similar goods, and, further, in every room in the house except the daughter's bedroom still other articles all subsequently identified as being stolen. There was no evidence that the appellant had been concerned in the buying, selling, or otherwise dealing in any of the stolen articles, and the appellant and his wife both gave evidence that the business carried on there was the business of the wife, and that the appellant had nothing to do with it. In fact the sole evidence against the appellant upon the charges of which he was convicted consisted of what he said and did on the occasion of the police visit to his house on May 9.

As to his actions, it is right to say that the detective inspector agreed that the appellant made no attempt to prevent the police from searching the house. As to his words, the evidence of Detective Inspector Quinton, so far as material, was to the following effect: He said that he went to the house on May 9. “(Q.) Is that a house occupied by the two prisoners Jones? (A.) Yes. (Q.) Will you describe the sort of house it is? (A.) It is a rather large old-fashioned type of dwelling. There is an archway which leads to a garden and yard at the back, and the front door is from the archway. (Q.) When you went there first at 8 o’clock did you find they were both out? (A.) Yes. (Q.) At 8.20 p.m. did James Leonard Jones arrive at the premises? (A.) Yes. (Q.) Did you speak to him? (A.) I said to him: ‘We are police officers. We have reason to believe you have a number of ladies’ coats and dresses in the house and that they are stolen property’. (Q.) What did he reply? (A.) ‘There is nothing here’. (Q.) What did you say to that? (A.) ‘Have you any new clothing here at all?’ (Q.) And his reply? (A.) He said ‘No’. I then told him: ‘I am not satisfied; I am going to search the house’. (Q.) What did Jones say then? (A.) ‘Well, my wife did buy three coats but I do not know where she has put them. Perhaps my daughter will know’, and he called his daughter who was in the front room”. A little later, the inspector said that he found certain books and articles, and the question was put: “(Q.) Did you then speak to Jones again about what you had found? (A.) Yes. (Q.) What did you say? (A.) I said to him: ‘Are there any more?’, and I cautioned him then. He said: ‘They are all in this room and there is nothing else in the house’”. The inspector continued, saying that he, not being satisfied, continued to search and went into the front room upstairs in spite of that denial. There, he found nine more ladies’ coats and three dresses, again all were new and bore price tickets, and they were part of the property identified as having been stolen. Then he was asked: “(Q.) What did Jones say about them? (A.) He said: ‘These are my wife’s and daughter’s; they have had them a long time’. I told him

1948.
Oct. 25;—
Nov. 2.

JAMES
LEONARD
JONES.

Humphreys,
J.,
Lewis, J.,
Jones, J.

1948.
Oct. 25;
Nov. 2.

the price tickets were still attached and he did not reply to that ”.

JAMES
LEONARD
JONES.
—
Humphreys,
J.,
Lewis, J.,
Jones, J.

The Assistant Recorder, who tried the case, left to the jury the receiving counts, directing them that it was open to them to find on the evidence that the stolen property was in the joint possession of husband and wife, and there was, in our opinion, ample material upon which the jury could find that the appellant was well aware that the articles were stolen. Indeed, it may well be that the jury would have convicted the appellant upon those charges if they had not been afforded an opportunity of finding him guilty of what they probably regarded, having the indictment before them, as a minor form of charging him with having assisted his wife throughout in her felonious dealings.

In his summing-up the learned Assistant Recorder, after dealing with the evidence upon the receiving charges, proceeded as follows: “ Assuming that you are not satisfied as to all or any of the charges of receiving, that the property ever came into Jones’ possession, you will then have to consider the remaining counts on the indictment against him, that is to say, counts 12 to 20 in which he is charged with what is known as being an accessory after the fact. An accessory after the fact is one who, knowing that another person has been guilty of felony, takes some active step to conceal the felony and to prevent the apprehension of the principal felon, and if it is material ”—what that means, I do not know—“ you will have to consider whether Jones’ conduct was that of a man taking active steps to conceal a felony committed by Mrs. Jones, assuming, of course, that you think Mrs. Jones was guilty of receiving. So much as to the position generally, and you will have the indictment before you and you will have to consider each charge separately. I come now to deal with the evidence ”. And that was all. No further reference was made throughout the summing-up to the charges of being an accessory after the fact.

That direction left the jury entirely without guidance as to what “ active steps ” (to use the language of the Assistant Recorder) by a husband will bring him within the criminal

law, or what steps were relied upon by the prosecution and what was the significance of the evidence with regard to them.

There was in our view another serious omission from the summing-up in that the learned Judge failed to point out to the jury that the appellant on May 9 was being questioned by the police as a suspect liable, as he knew, to be charged himself with felonious receiving, as indeed he was, so that it was for the jury to consider whether his evasions and untruths may not have been due to his anxiety to avoid arrest, quite apart from any consideration of his wife and her position.

The direction to a jury approved by this Court in *LEVY*, 7 Cr. App. R. 61; [1912] 1 K. B. 158, was as follows: "I directed the jury that if they were satisfied that she removed the things mentioned from Green's workshop, knowing that he was guilty of committing the felony charged against him, and did so for the purpose of assisting him to escape conviction, they should find her guilty".

In our view, it was essential in the present case that the learned Judge should specify the act or acts alleged to have been done by the appellant for the purpose of assisting his wife to escape conviction, and further to direct them specifically that if the motive in the mind of the appellant was merely a desire to avoid his own arrest, that would not be sufficient to bring him within the purview of this charge. There are offences couched in such plain terms that nothing more is required than a statement of the offence to enable a jury to say whether the evidence is sufficient to convict, but this charge of being an accessory after the fact is not one, and in our opinion calls for a reasoned direction to ensure that no injustice is done to the accused person. The absence of any explanation to the jury upon the matter referred to rendered the summing-up in the peculiar circumstances of the case defective to such an extent as to make the trial unsatisfactory. Without saying that there was no evidence upon which the appellant could be convicted, the evidence properly considered was, in our opinion, very slight and called for a much fuller examination than it received at the hands of the learned Assistant Recorder.

1948.
Oct. 25;
Nov. 2.

JAMES
LEONARD
JONES.

Humphreys,
J.,
Lewis, J.,
Jones, J.

1948.
Oct. 25;
Nov. 2.

JAMES
LEONARD
JONES.

Humphreys,
J.,
Lewis, J.,
Jones, J.

Two other points were taken by Mr. Silverman. The first relates to the fact that advantage was taken by the prosecution of the terms of section 43 (b) of the Larceny Act, 1916, to prove in the course of the trial a previous conviction against the appellant of factory-breaking with intent to steal. This evidence was receivable for the purpose of proving guilty knowledge on the charges of receiving. There was no specific direction to the jury that they must disregard it when considering the charge of being an accessory. It would certainly have been better that the jury should be so directed, but as they acquitted the appellant upon the receiving counts to which it specifically related, we think it unlikely that it affected their minds upon the other counts.

The other matter is to be found at page 73 G of the transcript. In speaking of the question of possession by the then accused person Jones, the present appellant, the learned Assistant Recorder said this: "You will have to consider as to property generally whether this came into the possession of Jones, that would be in the joint possession of Jones and his wife, and whether at that time he knew that this was stolen property. That relates to the property generally, but there is one special matter which affects him, and you will remember that the wife, Mrs. Jones, told the detectives that he could recover some of the stolen property, and that subsequently some of these articles in question were produced by Jones and handed over to the detectives. All matters of fact are for you, but it seems to me that with regard to that particular property you can have little doubt that it came into the possession of Jones when he received it and took it to the detectives. Whether he knew at the time that it was stolen property, of course is another matter". That passage as appearing in the transcript is so glaring a misdirection that we feel it is doubtful whether some mistake in copying or possibly in mishearing may not have been made, but assuming that the words were used, it is true, as pointed out by Mr. James, that the learned Assistant Recorder was dealing with the question of possession as part of the case for

the prosecution upon the receiving counts. That the direction was wrong and seriously prejudicial to the appellant was admitted by Mr. James, but he argues that it could only have affected the minds of the jury upon those counts upon which the appellant was acquitted.

Whether the Court would have thought it right to act upon either of these unfortunate slips in the summing-up if they stood alone, we need not decide. They do tend to strengthen the view that this conviction is most unsatisfactory and cannot be upheld. The appeal is allowed and the conviction quashed.

Conviction quashed.

1948.
Oct. 25;
Nov. 2.

JAMES
LEONARD
JONES.

Humphreys,
J.,
Lewis, J.,
Jones, J.

Solicitors: Arthur Hall-Wright & Son, Birmingham, for the appellant; M. P. Pugh, Birmingham, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE LEWIS.

AMBROZY KOSCIUKIEWICZ.
JAN ULATOWSKI.

1948.
Nov. 8, 9.

*Alien—Failure to Register—Exemption—Former Polish Soldiers—
Aliens Order, 1920 (S. R. & O., 1920, No. 448) (as amended),
Arts. 6, 22 (2) (b)—Polish Resettlement Act, 1947 (10 & 11
Geo. 6, c. 19), s. 9 (8).*

By Art. 22 (2) of the Aliens Order, 1920 (as amended),
“An alien shall, during any period which he is a member . . .
(b) of any naval, military or air forces of any foreign Power
engaged, in alliance with His Majesty, in any war in which
His Majesty is also engaged . . . be deemed not to be an
alien for the purposes of any provision having effect by virtue
of this Order”.

1948.
Nov. 8, 9.

AMBROZY
KOSCIUKIE-
WICZ.
JAN
ULATOWSKI.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

By section 9 (8) of the Polish Resettlement Act, 1947 :
“ As respects any period between January 1, 1945, and the passing of this Act the powers conferred by section 1 (1) of the Allied Forces Act, 1940, shall be deemed to have been exercisable in relation to the [Polish] forces by reference to the law of Poland in force on that day and as if the said forces had not ceased to be recognised by the Government of Poland, and any Order in Council made under or by virtue of that Act shall be deemed to have had effect accordingly ”.

The appellants, who had been members of the Polish Army and had been brought to this country during the recent war, were, when the Polish Resettlement Act, 1947, came into force on March 27, 1947, given the opportunity of joining the Polish Resettlement Corps, of being repatriated to Poland, of emigrating, or of taking up work in this country under the direction of the Ministry of Labour. They refused to do any of these things, contending that they were still members of the Polish Army, and failed to register under the Aliens Order, 1920 (as amended), on the ground that they were exempted from the same by virtue of Art. 22 (2). They were convicted of offences against Art. 6 (1) of the Order.

Held, that it was not necessary to decide whether the appellants had been lawfully discharged from the Polish Army, as it was clear from section 9 (8) of the Act of 1947 that the Government of Poland recognised by His Majesty had ceased, as from January 1, 1945, to regard Polish soldiers in England as members of the Polish forces, and, therefore, the appellants could not bring themselves within Art. 22 (2) (b) of the Aliens Order, 1920. Accordingly, the appellants, being alien born, were aliens subject to the provisions of Art. 6 (1) of the Order, and were properly convicted of the offences charged.

Appeals against conviction.

The appellants were convicted at Wiltshire Quarter Sessions on October 6, 1948, of offences against Art. 6 (1) of the Aliens Order, 1920, and were each sentenced to four months' imprisonment.

Each appellant was charged that he, being an alien, namely, a Polish subject, who had attained the age of sixteen years and not being an enemy alien, failed to comply with certain requirements as to registration in that they failed to furnish forthwith to the registration officer of the registration district in which they were then resident, particulars as to the matters set out

in Schedule I of the Order. When the Polish Resettlement Act, 1947, came into force on March 27, 1947, the appellants, who were members of the Polish Army and had been brought to this country during the war, were given the opportunity of joining the Polish Resettlement Corps or of being repatriated to Poland if they wished or of emigrating or of taking up work in this country under the direction of the Ministry of Labour. The appellants refused to do any of these things and contended that they were still members of the Polish Army, and not liable to be discharged therefrom, and not liable to any regulation or control of the British Government. They did not comply with the requirements of the aforementioned article of the Order, and contended that they were protected by Art. 22 (2) of the Order.

1948.
Nov. 8, 9.

AMBROZY
KOSCIKIEWICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

C. D. T. Cassidy, for the appellant Kosciukiewicz :

The position as to whether the appellant was properly discharged from the Polish Army or not is by no means clear. It is submitted that he was never properly discharged. If, however, the appellant was properly so discharged, he was not liable to register as an alien, as he was exempted from liability by reason of Art. 2 (3) of the Polish Forces Order, 1947. He was hitherto a member of a Polish force administered entirely by the British Army. If that force ceased to be recognised by the Warsaw Government in 1945, it henceforward was an illegal body and should not have been kept under military discipline, unless it thereafter became to all intents and purposes part of the British Army. As soon as the Warsaw Government ceased to recognise the force to which the appellant belonged, he became for all purposes a member of the British Army and, as such, was not liable to register as an alien.

The appellant Ulatowski in person.

Gerald Thesiger, K.C., and *Seymour Collins*, for the Crown :

The appellants were alien born and had never been naturalised in England, and as such were subject to the provisions of Art. 6 (1) of the Aliens Order, 1920, unless they

1948.
Nov. 8, 9.

AMBROZY
KOSCIUKIEWICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

were exempt under Art. 22 of the Order. At the time of the alleged offences they had been validly discharged from the Polish Army. Moreover, as from January 1, 1945, the Government of Poland recognised by His Majesty ceased to regard Polish soldiers in England as members of the Polish Forces. They were not, therefore, members "of any naval, military or air forces of any foreign Power engaged, in alliance with His Majesty, in any war in which His Majesty is also engaged", nor were they members "of any naval, military or air forces maintained by any foreign authority recognised by His Majesty as competent to maintain such forces for service in association with His Majesty's forces". In strictness they became aliens, and subject to the Order of 1920 as from that date, but the British authorities did not require them to register while they were in camp under charge of a British officer, and they were not called on to register till some form of discharge had taken place; but by failing to register when called on to do so they committed an offence against the Order.

THE LORD CHIEF JUSTICE: These two appellants were convicted at the Quarter Sessions for the county of Wilts of an offence against Art. 6 (1) of the Aliens Order, 1920. Each was charged that he "being an alien, namely a Polish subject, who has attained the age of sixteen years and not being an enemy alien, failed to comply with certain requirements as to the registration in that he failed to furnish forthwith to the registration officer of the registration district of Mere and Tisbury, in which district he was then resident, particulars as to the matters set out in the First Schedule of the Aliens Order, 1920". Certain questions have been raised in the case with regard to whether or not the appellants, who were formerly in the Polish Army, were liable to register under the provisions of the Aliens Order, 1920. The case at first sight seemed to raise some rather difficult questions, and the Court and the appellants have had the benefit of a very careful argument by Mr. Cassidy, who has appeared for the appellant Kosciukiewicz. The other appellant said that he wished to

represent himself, and was given an opportunity of addressing the Court, and it is clear that the points which he desired to raise were the points which had been put on behalf of the other appellant by Mr. Cassidy. Having had the benefit of Mr. Cassidy's argument and Mr. Thesiger's argument for the Crown, the Court thinks that the question is not nearly so difficult as it at first appeared.

The facts are that the appellants, who were members of the Polish Army and were brought to this country, were given the opportunity of joining the Polish Resettlement Corps or being repatriated to Poland if they wished or of emigrating or of taking up work under the direction of the Ministry of Labour in this country. We are told that there are certain other cases, which are waiting for the decision of this Court in this case, in which men are classed as recalcitrants in the sense that they will do none of those things and have maintained that they are still members of the Polish Army and not liable to be discharged from that Army and, apparently, not liable to any regulation or control of the British Government.

Much of the case in the Court below, and much of this appeal, has been taken up in discussing whether or not the appellants were lawfully discharged from the Polish Army. That really brings us back to what I think lies at the root of this case, and that is whether at the time when they refused to register, the appellants were protected by Art. 22 of the Aliens Order, 1920, as amended, which provides: "An alien shall, during any period during which he is a member . . . (b) of any naval, military or air forces of any foreign Power engaged, in alliance with His Majesty, in any war in which His Majesty is also engaged, or (c) of any naval, military or air forces maintained by any foreign authority recognised by His Majesty as competent to maintain such forces for service in association with His Majesty's forces, be deemed not to be an alien for the purposes of any provision having effect by virtue of this Order". The question is whether the appellants were members "of any naval, military or air forces of any foreign Power engaged, in alliance with His Majesty, in any war in which His Majesty

1948.
Nov. 8, 9.

AMBROZY
KOSOWIKIE-
WICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

1948.
Nov. 8, 9.

AMBROZY
KOSCIEKIE-
WICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

is also engaged", or whether they were members "of any naval, military or air forces maintained by any foreign authority recognised by His Majesty as competent to maintain such forces for service in association with His Majesty's forces". Their submission was that they were members of such forces, and it appears that what had happened was that after the Polish Resettlement Act, 1947, came into force, an opportunity was given to members of the Polish Land Forces who were in England to join the Polish Resettlement Corps or to take the other options which I have mentioned. The appellants refused to do any of these things and thereupon they were told they were discharged from the Army and they maintain that they were not lawfully discharged and that, therefore, they were still members of the forces. But when one comes to examine the provisions of the Polish Resettlement Act, 1947, it seems to the Court clear that they were at the time when this formality of discharging was gone through, and had been for a very considerable time before that, no longer members of a "naval, military or air force of any foreign Power engaged, in alliance with His Majesty, in any war in which His Majesty is also engaged". So long as they were under the charge of an administrator who had been appointed by the Polish Resettlement Act, 1947, a British officer, and so long as they were in camp and under his control, although, as I think I shall show, in the opinion of the Court they were subject to the Aliens Order, the British authorities did not call upon them to register until they were told they were no longer required in the Polish Land Forces and some form of discharge was gone through. In the opinion of this Court all these questions which have arisen about whether they were formally discharged, whether they were properly discharged, or whether the persons who purported to discharge them had authority to discharge them, do not really arise. The only question is whether, on the true construction of section 9 of the Polish Resettlement Act, they were at the time when the purported discharge was gone through aliens for the purposes of the Order. It seems to the Court that they were aliens then and had been aliens

for many months before they were discharged, liable to register but not called upon to register until, if I may so put it, they were told to leave the camp.

Section 9 of the Act provides first of all in sub-section (1): "The Polish forces mentioned in paragraphs (a) and (b) of section 1 (1) of this Act shall be under the command of a person of British nationality appointed by the Secretary of State, being a person holding or having held a rank not below that of Major-General in the Army or a corresponding rank in another of the Armed Forces of the Crown, who shall be called the Administrator of Polish forces under British Command and is in this section referred to as 'the Administrator' ". Sub-section (2) then provides: "Members of the said forces shall be under obligation to observe, in matters concerning their discipline and internal administration, the rules in force as to those matters under the law of Poland on the 1st day of January, 1945", and then provision is made for punishing any person who fails to obey those rules, and certain powers of jurisdiction are given to certain persons to try these members of the Polish forces for offences.

When we get down to sub-section (8) we find that it is provided: "As respects any period between the first day of January, 1945, and the passing of this Act"—and this Act was passed on March 27, 1947—"the powers conferred by section 1 (1) of the Allied Forces Act, 1940, shall be deemed to have been exercisable in relation to the said forces by reference to the law of Poland in force on that day and as if the said forces had not ceased to be recognised by the Government of Poland, and any Order in Council made under or by virtue of that Act shall be deemed to have had effect accordingly". I may mention that the provision in the Visiting Forces (British Commonwealth) Act, 1933, had been applied to the Polish forces, and section 1 of that Act made provision with respect to the discipline and internal administration of visiting forces.

But it is clear now from section 9 (8) of the Act of 1947 that the Government of Poland, which we must take to be the Government of Poland recognised by

1948.
Nov. 8, 9.

AMBROZY
KOSCIUKIEWICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

1948.
Nov. 8, 9.

AMBROZY
KOSCIUKIE-
WICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

His Majesty, had ceased to regard these men as Polish soldiers. I do not want to go outside the facts of this case or the facts which were proved, but obviously what this section shows is that from January 1, 1945, by which time a new Government was set up in Poland which by the very terms of this section it is clear is recognised by His Majesty, that Government refused to recognise that Polish soldiers who were in England were members of the Polish forces. Therefore, it seems to the Court that the appellants cannot be said to be members of a military force "of any foreign Power engaged, in alliance with His Majesty, in any war in which His Majesty is also engaged". No doubt a state of war technically still exists between this country and Germany, and, therefore, technically, His Majesty is still engaged in a war, but it is impossible to say that His Majesty is still engaged in a war in alliance with a foreign Power who is maintaining these forces in England or that they are members of a military force of a foreign Power which is engaged in alliance with His Majesty, in view of the plain words which one finds in section 9 (8). Therefore, the question whether or not the appellants were lawfully discharged from the Polish Army falls to the ground and is quite immaterial. The question which occupied the Court below so much, and indeed occupied this Court for some time yesterday, whether or not the proper person had discharged the appellants or whether they could be properly discharged at all, becomes quite immaterial because, as I have already said, from January 1, 1945, they cannot be regarded as members of a military force of a "foreign Power engaged in alliance with His Majesty". The Government of Poland which His Majesty recognises, as is shown by this section of the Act of Parliament, says in effect: "We have nothing to do with these soldiers that are in England at all". That means that being alien born, they are aliens and they are subject to the provisions of the Aliens Order, and although as long as they were in camps in England it may be that they were not called upon to register, they were liable to register, although the authorities in England did not insist, for perfectly obvious

and good reasons, that they should register then. But the time came when their Government no longer recognised these men, who were all no doubt at one time members of the Polish Army and recognised as such by the Polish Government, and, therefore, they become men in this country not regarded by the country of their nationality as soldiers and left here for this country to deal with. This country has said that they can take one of several courses. Provision was made by the Polish Resettlement Act for the setting up of a Polish Resettlement Corps. The appellants refused to join it. They were not bound to join it, but if they did not, they then became subject to the other provisions of the law, and one of the provisions of the law is that they must register. As they have not registered they committed an offence under the Aliens Order, 1920, and, therefore, they were properly convicted.

1948.
Nov. 8, 9.

AMBROZY
KOSCIUKIE-
WICZ.
JAN
ULATOWSKI.

Goddard,
L.C.J.,
Humphreys,
J.,
Lewis, J.

Appeals dismissed.

CIRCUIT CASE (MIDLAND CIRCUIT)

WARWICKSHIRE ASSIZES.

BEFORE

MR. JUSTICE BYRNE.

FREDA MARGARET BLAKEMORE.

1948.
Nov. 30.

Arraignment—Plea of Guilty Followed by Sentence—Withdrawal by Permission of Judge.

Withdrawal of a Plea of Guilty which had been followed by sentence permitted by the Judge in exceptional circumstances.

The prisoner, on being arraigned at Warwickshire Assizes (Warwick Division) before Byrne, J., on November 30, 1948, on an indictment which charged her with receiving meat, knowing it to have been stolen, pleaded Guilty and expressed



1948.
Nov. 30.

FREDA
MARGARET
BLAKEMORE.

Byrne, J.

a desire to instruct counsel from the dock. She selected counsel (*John T. Hooper*), to represent her, and after counsel had addressed the Judge in mitigation, the Judge passed a sentence of twelve months' imprisonment. Before passing sentence, the Judge said that he had read the depositions, and inquired of defending counsel whether he was satisfied that the offence involved knowledge by her at the time when the property came into her possession that it had been stolen. Counsel informed him that, upon his instructions, he regarded it as a proper plea. Subsequently, after sentence, the prisoner asked to see her counsel again and gave him fresh instructions. Counsel informed the Judge of this, and asked the Judge that, in view of these fresh instructions, the prisoner should be allowed to withdraw her plea and plead Not Guilty.

BYRNE, J., said that he regarded the case as quite an exceptional one and that he thought the proper course was to allow the application and permit the prisoner to withdraw her plea of Guilty upon the ground that she had not understood the ingredients of the offence when she entered her plea. The sentence would, therefore, be annulled and the prisoner would be tried at Birmingham, and admitted to bail in the meantime.

On December 2, 1948, the prisoner was arraigned at the Warwickshire Assizes (Birmingham Division) and pleaded Not Guilty. She was tried before Finnemore, J., and a jury, and on conviction, was sentenced to twelve months' imprisonment.

Colin Coley appeared for the prosecution.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LEWIS
AND MR. JUSTICE PRITCHARD.

GEORGE SEMINI.

1948.
Dec. 20.
1949.
Jan. 11.

*Murder—Chance Medley—Doctrine Now Obsolete—Cases to be
Regarded as Illustrating Provocation.*

The old doctrine of “chance medley” no longer has any place in the law of homicide. Cases cited under the heading of “chance medley” in earlier editions of *Archbold’s Criminal Pleading, etc.*, and other textbooks on criminal law must be regarded as illustrations of the provocation which the Courts have accepted as sufficient to reduce a killing from murder to manslaughter, and must be read in the light of *HOLMES v. DIRECTOR OF PUBLIC PROSECUTIONS*, 31 Cr. App. R. 123; [1946] A. C. 588 and *MANCINI v. DIRECTOR OF PUBLIC PROSECUTIONS*, 28 Cr. App. R. 65; [1942] A. C. 1.

Appeal against conviction.

The appellant was convicted at Staffordshire Assizes on November 30, 1948, of murder and was sentenced by Hallett, J., to death.

In the late evening of October 10, 1948, the appellant was walking with a young woman past a hotel at Newcastle-under-Lyme. One of three men standing near the hotel made an observation about the woman which the appellant resented. The deceased man, Joseph Gibbons, was one of the three. The appellant went back and knocked down one of the three men, Robert Woodyatt. The appellant admitted that this was the first blow to be struck. The deceased man then incited Woodyatt to fight the appellant, and Woodyatt prepared to do so. Two unidentified bystanders tried to restrain the appellant by holding his arms, but the appellant broke away. He produced a knife and advanced towards Woodyatt and the deceased man, saying, “I’ll get the two of them”. A scuffle

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

followed, as a result of which Gibbons was stabbed through the heart and Woodyatt and the other man wounded. No one other than the appellant had a knife at any time during the affray.

HALLETT, J., directed the jury that, before the defence of "chance medley" could be established, it must be shown that there was provocation sufficient to cause a reasonable man to lose control and that the act which caused the death was commensurate with the provocation received.

Cartwright Sharp, K.C., and E. Brian Gibbens, for the appellant:

This was a case of homicide in a chance medley. If two persons engage in a sudden quarrel and then in the course of it one of them in the heat engendered by the fight draws a lethal weapon and kills his adversary, the killing is manslaughter only, unless the accused went into the fight armed and with the intention of using his weapon. *Archbold's Criminal Pleading, etc.*, 31st ed., pp. 869, 870; SNOW (1776), 1 Leach 151; TAYLOR (1771), 5 Burr. 2798; and SMITH (1887), 8 C. & P. 160. The direction to the jury by Bosanquet, J., in SMITH (at p. 162) was right, namely: "Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? If he did, it will amount to murder. But if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? If he did, then it will be manslaughter". That has been accepted as correct and Judges have directed juries accordingly for a long time, and it was referred to as a possible defence in the judgment of Viscount Simon, L.C., in *MANCINI v. D. P. P.*, 28 Cr. App. R. 65, at p. 75, [1942] A. C. 1 at p. 10. Hallett, J., confused the defence of homicide in a chance medley with the defence of provocation: he misdirected the jury when he said: "If a man's blood is sufficiently heated, if he loses his control sufficiently . . . the jury may decline to

draw the inference that [he] intended to murder. . . . If you form the view that a reasonable person so provoked could be driven, through a transport of passion and loss of self-control, to the degree and method and continuance of violence which produced the death, and that the prisoner's action was committed under the influence of such loss of control, why, then, you should find him guilty of manslaughter''.

Eric Sachs, K.C., and Norman Carr, for the Crown :

Since 1860, chance medley has never meant more than self-defence; *Russell on Crimes* (9th ed.), vol. I, p. 505. In *Blackstone's Commentaries*, Book IV, it is stated (at p. 184) that "excusable homicide is of two sorts" and (at p. 186) that one sort is "homicide in self-defence". Hale's P. C., vol. I, p. 471, refers to "chance medley or killing *per infortunium*", and gives as an example the instance of a man who is killed by another man when felling a tree. Cf. also East's P.C. (1803), vol. I, pp. 220, 221; *Roscoe's Criminal Evidence* (15th ed.), p. 854. The statements in Hawkins' P. C., vol. I, at pp. 84 and 89, are responsible for the misstatement of the law in *Archbold's Criminal Pleading, etc.*, which has run through a number of editions of that work. The Judge properly directed the jury in accordance with the decision in *HOLMES v. DIRECTOR OF PUBLIC PROSECUTIONS*, 31 Cr. App. R. 123, [1946] A. C. 588.

Cartwright Sharp, K.C., replied.

At the conclusion of the arguments, the LORD CHIEF JUSTICE announced that the appeal would be dismissed, and that the Court would give their reasons at a later date.

Cur. adv. vult.

Jan. 11, 1949.—The following judgment of the Court was read by :

THE LORD CHIEF JUSTICE: The appellant, George Semini, was convicted before Hallett, J., at the Stafford Assizes of the murder of Joseph Gibbons and was sentenced to death. This Court has already dismissed the appeal and now proceeds to give its reasons for so doing.

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

—
Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

According to the evidence, the appellant, on the late evening of Friday, October 10, 1948, was walking with a young woman named Sheila Seabridge past the Talbot Hotel at Newcastle-under-Lyme, when one of three men standing there made an observation about Miss Seabridge which the appellant resented. The three men were the deceased, Charles Stanley and Robert Woodyatt.

The appellant and Miss Seabridge had passed the three men when the observation was made, but the appellant went back to them and struck Robert Woodyatt with his hand or fist, causing him to fall to the ground. The appellant admitted that this blow was the first to be struck. Thereafter the order in which events followed is not easy to ascertain from the evidence; but it does appear to be reasonably certain that the deceased incited Woodyatt to fight the appellant and that Woodyatt got up from the ground and began to take his coat off as though preparing for a fight. It is also clear that two unidentified bystanders restrained the appellant by holding his arms, and that the appellant so held was uttering threats to the deceased and Woodyatt. Then the appellant broke away from those who held him and, producing a knife, advanced on Woodyatt and the deceased saying "I'll get the two of them". In the scuffle which followed the deceased was stabbed through the heart, Woodyatt and Stanley also being wounded by the appellant's knife, which was not found after the killing. No one other than the appellant had any knife at any time during the affray. There was evidence that about three weeks prior to the affray the appellant showed to a man named Ashley a knife with a blade about 8 inches long and said he would use it if more than one person attacked him. There was medical evidence that the mortal wound inflicted upon the deceased could have been caused by such a blade. The appellant was a native of Malta and had had some experience as a sparring partner to a professional boxer.

Mr. Cartwright Sharp's first and main contention was that there was here on the facts a case of killing by chance medley, and that there was no proper direction and, indeed,

actual misdirection on this subject. He contended that the summing-up amounted to a direction that, before the defence of chance medley could be established, it must be proved that the provocation was such as would cause a reasonable man to lose control and that the act which caused the death was commensurate with the provocation received. This, he contended, does not apply to chance medley, to which, as we understood him, he contended the doctrines relating to provocation have no application. The first and most important thing then is to understand what the expression "death by chance medley" means. The contention was that if two men quarrel and fight and either or both of them are armed with a lethal weapon and in the heat of the quarrel one draws and uses the weapon with fatal results, that is causing death by chance medley and amounts to manslaughter, unless and only unless the jury find that he all along intended to cause the death of the other and was armed for that purpose. In truth this is not what was ever meant by the expression "death by chance medley"; if the finding of the jury established that the death was caused by chance medley, the prisoner escaped any corporal penalty and was not convicted of manslaughter, but the expression, as we hope to show, has now no place or importance in the law relating to homicide. A reference to *Blackstone*, Book IV, page 184; *Hale*, vol. I, page 470, and *Hawkins*, pages 84 and 89, makes it clear that this expression applied only where the killing was *se defendendo*, that is in defence of a man's person or property upon some sudden affray, and probably also where the killing was *per infortunium*, and, in either case, where the law would attach some degree of blame for the killing but would excuse it. It was excusable as opposed to justifiable homicide. The latter includes cases of unavoidable necessity, such as a householder attacked by an armed burglar killing the latter as the only means of protection against the attack. It includes also killing in execution of sentence of death pronounced by a lawful Court, or of rioters if the riot cannot otherwise be suppressed or in arresting a felon where resistance cannot otherwise be overcome.

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

—
Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

—
Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

But where the killing was the outcome of a quarrel or fight it was excusable, though not justifiable, if the killer had not begun but had taken part in the fight, or if having begun it he endeavoured to decline any further struggle and retreated, but being closely pressed killed his antagonist to avoid himself being killed or maimed. This in our opinion is the result of the authorities to which we have referred. The expression seems also to have been applied to cases where the killing was due to misadventure in the performance of a lawful act and where there was no such negligence in its performance as would amount to manslaughter, but we need not explore the refinements of the old law regarding death *per infortunium*; the result was the same as in the case of death *se defendendo*. It is obvious that at the present day there would in such cases be no room for any verdict but one of "not guilty"; indeed, section 7 of the Offences against the Person Act, 1861, expressly provides that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence or in any manner without felony. This section replaces and re-enacts 9 Geo. 4, c. 31, s. 10, and the appearance of the word "forfeiture" helps to solve any difficulty that may be felt as to the distinction which formerly existed between justifiable and excusable homicide. Some degree of blame attached to the man who killed another with whom he was fighting, though the killing was in his own defence, for he ought not to have engaged in a fight; he was excused from suffering a penalty, but his goods were liable to be forfeited to the King, and both in the case of death caused *se defendendo* and *per infortunium* the thing by which the death was caused was forfeited as a deodand. It seems that where there was room for a verdict of chance medley the Court directed the jury to find a special verdict and if on the facts found the Court decided that it was a case of death by chance medley, no corporal sentence on the prisoner was passed, but forfeiture of his goods and the deodand was ordered. Sir James Fitzjames Stephen, who was the greatest and most authoritative institutional writer on the criminal law

of last century, nowhere in his *History* or in his *Digest of the Criminal Law* ever refers to death by chance medley as such; he does deal at length with death *per infortunium* and *se defendendo* and gives a full review of *Foster's Treatise on Homicide*, as it refers to this matter. He points out that Foster implies that by his time, and his work was published in 1762, special verdicts finding justifiable or excusable homicide had fallen into disuse and the Judges were taking general verdicts of acquittal in plain cases of *infortunium* and *defendendo*. The learned author goes on to say that the law upon this subject may be considered to have fallen into desuetude in the course of the eighteenth century and it was finally abolished in 1828 by the Act of Geo. 4 to which we have already referred. Deodands indeed retained their legal existence till 1846 when they were abolished by 9 & 10 Vict. c. 62. As a matter of some historical interest, it is probable that what led to the passing of the latter Act was that the London and Birmingham Railway Company had a year or two earlier been amerced in the sum of £2,000 representing the value of a railway engine that had run over and killed a man, thus becoming a deodand. It was accordingly necessary to adapt the law to modern conditions, and, as the law on the subject was too firmly established to be modified by judicial decision, the change had to be effected by statute.

Mr. Cartwright Sharp drew our attention to TAYLOR (1771), 5 Burr. 2793, SNOW (1776), 1 Leach 151, and SMITH (1837), 8 C. & P. 160, in support of his argument. In none of these cases was chance medley mentioned by any of the Judges who decided them. They are all cases which turn on whether there had been provocation enough to reduce the crime to manslaughter. No one doubts that blows and probably threatening gestures if near enough and serious enough to cause loss of control may justify and indeed require the killing to be regarded as manslaughter only. At a time when society was less secure and less settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

1948.
Dec. 20.
1949.
Jan 11.

GEORGE
SEMINI.

Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

moral stigma if fairly conducted, it is not surprising that the Courts took a view more lenient towards provocation than is taken today when life and property are guarded by an efficient police force and social habits have changed. It is enough to say that *HOLMES v. D. P. P.*, 31 Cr. App. R. 123; [1946] A. C. 588, affirming the decision of this Court, lays down rules on the subject which are authoritative and are to be followed by all Courts when the question of provocation becomes an issue in relation to killing as the outcome of a quarrel or a fight. The old learning, such as it was, with regard to chance medley, has long been obsolete and was finally laid to rest by 9 Geo. 4, c. 31. The doctrine has no longer any place in the law of homicide and we may express the hope that it will no longer appear in *Archbold* as though it were an existing doctrine. The cases cited under that heading are to be regarded as illustrations of what the Courts have accepted as sufficient to reduce a killing from murder to manslaughter and all of them must now be read in the light of *HOLMES' CASE* (*supra*), and *MANCINI v. DIRECTOR OF PUBLIC PROSECUTIONS*, 28 Cr. App. R. 65; [1942] A. C. 1, which preceded it.

The other matter on which Mr. Cartwright Sharp relied as misdirection was that he contended that the learned Judge on three or four occasions in his summing-up directed the jury that there was no evidence that the prisoner had ever been struck. There are no doubt passages which do suggest that in his opinion the evidence did not disclose that any blows had actually been inflicted on the prisoner before he stabbed the deceased. The evidence, as generally is the case when there is a disturbance or brawl in a street, was on such a point somewhat obscure, but the direction on the law was both adequate and correct and the learned Judge not once but twice read the material evidence to the jury. What does seem to be beyond controversy is that the prisoner struck the first blow knocking down the witness Woodyatt and struck the dead man in the face when he went to Woodyatt's assistance, that thereupon bystanders seized and held the prisoner in an endeavour to prevent further trouble, that the prisoner, who is undoubtedly

a powerful man and a pugilist, wrenched himself free, drew his knife and saying "I will get the two of them" made after Gibbons. Assuming that the latter turned and closed with the prisoner, what possible excuse could there be for him then to use the terrible and deadly weapon that he had drawn and with which he stabbed Gibbons through the heart? It was a dreadful and cowardly act of revenge on a man who had assisted the prisoner's first victim and was prepared to repel an assault on himself. There was no misdirection and, if there had been, there was only one verdict that a reasonable jury could have returned, the one they did return.

1948.
Dec. 20.
1949.
Jan. 11.

GEORGE
SEMINI.

—
Goddard,
L.C.J.,
Lewis, J.,
Pritchard, J.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE FINNEMORE.

EVAN OWEN HUGHES.

1949.
Jan. 24.

Evidence—Sexual Offence—Corroboration—Conversation Between Prisoner and Third Person—Incitement to Commit a Different Criminal Offence—Vague Reference to Association Between Prisoner and Person Named in Indictment.

The appellant was charged with buggery with W. (known as Bobby), a youth of nineteen, who was mentally deficient and of bad character, and lived in a place known as the Valley. W. was also charged, and after pleading Guilty, gave evidence for the prosecution. Evidence was admitted of a conversation between the appellant and one T. several months before the offence charged, in which, according to T., the appellant incited T. to commit an act of gross indecency with him, which T. refused to do, and the appellant thereafter said that Bobby had told him that the Valley boys were good ones, but that Bobby was a damned good one. Apart from the evidence of T., W.'s evidence was uncorroborated.

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

Held, that as there was no charge in the indictment of any offence between the appellant and T., the evidence as to the alleged indecent overture by the appellant to T. would not have been admissible by itself. It could only have become admissible as explanatory of the second part of T.'s statement, but that part of the statement was far too vague to be construed as an admission by the appellant of indecent association between W. and himself and should not have been admitted. The whole of T.'s evidence ought, therefore, to have been excluded, and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Carnarvonshire Assizes on October 21, 1948, of buggery, and was sentenced by Pritchard, J., to eighteen months' imprisonment.

The appellant was indicted with having committed the offence with Robert Owen Williams (generally known as "Bobby"), a youth of nineteen, who was a mental defective and of bad character, and lived at the Valley, Anglesey. Williams was also indicted and pleaded Guilty, and was then called as a witness against the appellant, who was a man of good character. Williams was employed at a hotel which the appellant used and had often been seen there by the appellant. The appellant gave evidence that on one occasion Williams had invited him to commit buggery, but that he had refused to do so, and said that Williams's story was entirely untrue. There was no corroboration of Williams's evidence, except the evidence of a man named Thomas, which was to the following effect: some eight months before the date of the offence charged, the appellant, who was employed at Thomas's farm feathering fowl, came up to Thomas and incited Thomas to commit an act of gross indecency with him; that Thomas told the appellant he had more respect for himself than to do such a thing, and that the appellant then said that Bobby had told him that the Valley boys were good ones but that he (Bobby) was a good one or a damned good one. Objection was taken by defending counsel to the admission of Thomas's evidence, but Pritchard, J., ruled that it was admissible.

James Burge, for the appellant :

Evidence tending to show that the appellant was likely to commit the offence was inadmissible. Evidence tending to show that the appellant did commit the offence was admissible even if it tended to show also that he was a person likely to commit the offence. First, the evidence of Thomas was not logically probative of the offence charged. Secondly, even if the evidence was capable of the construction put upon it by the prosecution, the weight of the evidence was so slight and it had so little probative value that, in view of the great prejudice created by the first part of the evidence, it should have been excluded.

Paul Wrightson, for the Crown :

On the authority of SIMS, 31 Cr. App. R. 158 ; [1946] K. B. 531, the first part of Thomas's evidence was admissible, as being repetitive conduct and therefore showing a specific feature connecting the appellant with the crime charged. The Judge, however, does not appear to have admitted the evidence on that ground, but as being explanatory of the second part of the evidence, which was capable of being construed by the jury as an admission by the appellant of an indecent association between himself and Bobby, although, admittedly, the language was not very precise. It was within the discretion of the Judge whether to allow the admission of the evidence or not.

HUMPHREYS, J. : The appellant was convicted at Carnarvonshire Assizes of buggery, and appeals against that conviction, substantially on the ground of the admission of evidence which he submits was inadmissible. It is a commonplace to say that no evidence must be admitted in a criminal Court against an accused person unless it is admissible on some legal ground.

The admissibility of evidence in every case must to some extent depend on the character of the witness. In this case, Robert Owen Williams, who was generally known as " Bobby ", a youth of nineteen, was, to the knowledge of the prosecution at any rate, mentally deficient. That probably accounts for the fact that when he was put into the witness box he was not

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

asked about what date he was speaking, presumably because he was incapable of remembering dates. He was also a person of the most detestable character, having pleaded guilty to committing this crime with no less than fifteen other male persons, while the appellant was a man of excellent character. He was asked: "Last winter did something happen to you?", and he said "Yes", and described what it was. That being so, it was quite obvious that no jury could be asked to convict on the evidence of such a youth unless it was properly corroborated by evidence which did tend to show that it was probably true. The person selected to corroborate him was named Norman David Jones Thomas, himself a person of bad character who had confessed to committing the offence with Bobby. Thomas, in giving evidence, said that shortly before Christmas, 1947, he was working on a farm called Treddaniel near Holyhead, of which he is the owner, and that the appellant, who was employed at the farm and had been feathering fowl, came up to him and had a conversation with him. The conversation, which was in Welsh, was objected to, but was eventually admitted by the Judge. The conversation was interpreted into English, and was taken down by the shorthand writer in the following form. (Q.) You had a conversation with him? (A.) Yes. (Q.) In Welsh or English? (A.) In Welsh. . . . (Q.) Now what did he say to you in Welsh? (A.) He asked me to go with him and soften it—he had an awful erection. One asks first of all: Is that conversation admissible in evidence? and the answer is: clearly not, because this is not one of the cases in which it is permissible on charge A to introduce as evidence the fact that the accused person has committed something which may be called offence B. Counsel then asked the witness, did you reply to him in Welsh? (A.) Yes, and I told him I had more respect for myself than to do such a thing. (Q.) Did the conversation continue in Welsh? (A.) I did not say much then. He then told me that Bobby had told him that the Valley boys were good ones, but that Bobby was a good one or a damned good one. I venture

to think that it is not quite clear what that meant. It might mean: "Bobby told me [the appellant] that he was an indecent person and that the other boys in the Valley were also indecent boys", so as to amount to an admission that the appellant knew that Bobby was an indecent boy, or it might mean that the other boys had said so. That was the whole of the corroboration which was relied upon. The appellant never saw Thomas again, except to speak to him on business.

That evidence had to be made relevant to the charge of committing buggery several months after that conversation. The Judge, after hearing the objection to the admissibility, admitted it on the following ground, as stated by him in his summing-up: "The prosecution called before you a man named Norman David Jones Thomas, and they asked you to look at his evidence, and they say that, if you look at his evidence, you will find there something which tends to show that the evidence of Robert Owen Williams is true. Now what is the evidence of Norman Thomas? He says that at Christmas, 1947, some eight months before the alleged offence took place, he saw the accused man feathering fowls at a farm at Treddaniel and he said that the accused man came up to him and asked him to commit a disgusting act with him". The first observation which I desire to make is that, unless he qualified those observations in some way, the learned Judge was there inviting the jury to take into consideration on the question of whether the appellant months afterwards did what was charged against him the fact that this witness proved, if his evidence was accepted, that the appellant had suggested indecency with another man once before. The Judge continued: "Norman Thomas said he refused to do that. He said he had more self-respect and he said that the accused in reply said: 'Bobby told me the Valley boys are good ones and Bobby is a damned good one'". That is not quite what the shorthand writer took down from the witness, but those were the words which the Judge used. The learned Judge continued: "The prosecution ask you, members of the jury, to read from that conversation this. They ask you to say that that conversation showed that

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

the accused, having just invited Norman Thomas to commit an extremely disgusting act with him and having been refused by Norman Thomas, said, immediately afterwards, that according to what Bobby had told him the Valley boys were good ones and that Bobby himself was a damned good one. Putting it into a nutshell, what the prosecution are really asking you to say is that the accused was then saying to Norman Thomas that he knew very well he could have got from Bobby what Norman Thomas had refused to give him on that occasion ”.

The Court has not found this an easy case to decide. All the members of the Court are of the opinion that if the appellant had in the course of that conversation said in plain terms: “ I know Bobby, you know Bobby, the man I mean. I am in the habit of committing indecencies with him ”, or “ Bobby and I have done this sort of thing together ”, that statement would have been admissible, because Bobby was the person with whom the appellant was charged with doing something similar, only worse, later on. The difficulty, however, about this matter is that the conversation may mean almost anything. It may have been quite innocuous, and it was admitted very much in connection with a different charge, a charge which the jury were never warned that they were not trying and ought not to take into consideration whether it was proved or not, the charge which might have been made against the appellant that he incited Thomas to commit an indecent act with him.

In the leading case of THOMPSON, 13 Cr. App. R. 61; [1918] A. C. 221, a man had been charged with indecent acts with several boys, and in his possession were found some indecent photographs. They were not shown to the boys at all, but they were photographs which certainly intimated to everyone who looked at them that the accused man was a grossly indecently minded person. The question was raised: was this evidence admissible? It was admitted by the trial Judge; it was held to have been properly admitted by the Court of Criminal Appeal; and it was held by the House of Lords to have been properly admitted on the ground that the articles in question were actually found on the man when he was

arrested. In the course of his speech, Lord Sumner, in words which are very well known to all lawyers, observed as follows (at pp. 78 and 232 of the respective reports): "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but, sometimes for one reason, sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge"—that his reference principally to knowledge that the goods were stolen or that the coins were bad in crimes such as receiving stolen property or coining—"or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear". Then the learned Law Lord said: "In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted".

In this case we feel that the evidence referred to has not been brought within the language used by Lord Sumner. It seems to us that the prosecution were saying that it would be very useful if they could get before the jury evidence that the appellant tried to induce another person to commit an indecent act with him, and that therefore they decided to call Thomas and to bolster up the first part of Thomas's evidence by the second part, which was to the effect that he and the appellant did refer to Bobby in the course of their conversation, and that the appellant said that Bobby was a good one. What the jury thought about Thomas's evidence we do not know and never can know, but they may well have thought that on that evidence they were entitled to take into consideration the question whether it was true that the appellant had invited Thomas to commit an indecent act with him. If that was so, I do not think that there would be any dispute that the jury were wrongly directed in that matter, because there was no such charge in the indictment and the evidence as to that indecent overture would not have been admissible by itself.

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

1949.
Jan. 24.

EVAN OWEN
HUGHES.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

It was only because it was said to be explanatory of the second part of Thomas's statement that it was admitted at all. In our opinion the evidence was much too vague. There is a doctrine in criminal law which has been referred to in many cases, but principally perhaps in *CHRISTIE*, 10 Cr. App. R. 141; [1914] A. C. 545, where Lord Moulton observed as follows (at pp. 160 and 559 of the respective reports): "The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the Judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection", and counsel usually acts in accordance.

In our opinion, the lowest at which this case can be put is that the admission of the evidence was very unfortunate. For my own part, I go further and say that the evidence was not admissible upon any ground known to the law. It was highly prejudicial, because it not only proved this rather vague conversation about Bobby several months before the appellant was alleged to have committed the offence with Bobby, but it also tended to show that the appellant had committed a different criminal offence with a different man, which was not charged at all. We are of opinion that the evidence should not have been admitted, and that on that ground the conviction should be quashed.

Conviction quashed.

[DIVISIONAL COURT CASE.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE FINNEMORE.

RUSE v. READ.

1949.
Jan. 17, 26.

Larceny — Original Taking a Trespass — Subsequent Animus Furandi.

The respondent took from a fair ground at Sidmouth a bicycle belonging to one P., and after riding about on it in the neighbourhood for some two hours put it in a lane behind the house at Sidmouth where he was staying. On the following morning he removed a dynamo and pump from the bicycle, and consigned the bicycle by rail to York labelled "Mr. Read (the respondent's own name), York Railway Station, To be collected". He stated in evidence that he had no intention of going to York to collect it. The bicycle was intercepted at Sidmouth Railway Station before despatch.

Held, that the respondent's conduct on the morning after the taking of bicycle was clearly indicative of an intention permanently to deprive the owner of his property and that, as the original taking amounted to a trespass and accordingly a tortious, though not felonious, act, as soon as the respondent entertained a felonious intent with regard to the property, the trespass became a larceny, and the respondent was accordingly guilty of larceny of the bicycle.

RILEY, (1853) 1 Dears. C. C. 149, followed.

Case stated by Devonshire justices.

At a Court of summary jurisdiction at Sidmouth an information was preferred by the appellant, William Edwards Ruse, a sergeant of police, charging the respondent, Ivan Steward Read, for that he on June 30, 1948, stole a pedal bicycle with a pump and a dynamo lighting set, the property of one Raymond Purchase. The respondent elected to be tried summarily and the justices dismissed the information.

It was proved that the bicycle in question was wrongfully taken by some person between 9.30 and 9.45 p.m. on June 30 from the entrance to an amusement fair being held at Yard

1949.
Jan. 17, 26.

RUSE v.
READ.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

Mead Meadow on the Sidford Road within two or three miles of Sidmouth.

The respondent was an electrical artificer in the Fleet Air Arm stationed at Warrington, in Lancashire, but on June 30 was on leave and was living in his mother's house at Sidmouth. He was nineteen years of age and of good character. According to para. 4, sub-paras. (3) and (4) of the case: "On the same evening the respondent, who had visited at least five public houses and had been drinking a quantity of rough cider and beer, walked to the fair ground and round the various side-shows there. On leaving the fair ground he noticed the bicycle belonging to Raymond Purchase leaning against the wall. It was noticeable and because of its bright red colour he was attracted to it. He took the bicycle and rode about on it in the neighbourhood for about two hours. He had by then sobered up and not knowing what to do with the bicycle went home and put it in the lane behind his mother's house in which he was then living and went straight to bed. On the first day of July, 1948"—that is, the next morning—"at about 9 a.m. he was, as he said in his sworn evidence, in a 'panicky' condition and wondered what to do with the bicycle. He had told no one that he had taken it, but to get it away from his mother's house he removed the dynamo and pump from the bicycle. The dynamo he then sent by registered post addressed to himself at H.M.S. 'Ariel', West Warrington. The pump he left at his home. At 10.45 a.m. at Sidmouth Railway Station he consigned the bicycle by rail for the sum of 12s. 2d. to York labelled 'Mr. Read, York Railway Station, To be collected'".

Paragraph 5 stated: "On the same day at 4.30 p.m. Arthur Thomas White, a schoolboy returning home from school, saw the bicycle at Sidmouth railway station, recognised it as belonging to Raymond Purchase, and made a report to Raymond Purchase and the police were informed". That evening the respondent was seen by a police constable. He then made a statement to the effect stated in paragraphs 4 (3) (4) and added: "My purpose in sending it (the bicycle) to York was to get rid of it, as I didn't know what to do with it after sobering

up. I thought if I sent it away and as I was returning to my station on Friday, July 7th, no one would know anything about it ”.

On the hearing of the information the respondent gave evidence on oath to the same effect as his statement to the police. In the course of his evidence he said that when he sent the bicycle to York he had no intention of going to York to collect it.

The opinion of the justices was thus stated : “ We carefully considered all the evidence, including that of the respondent, and his manner and demeanour in giving it. We came unanimously to the conclusion that at the time of the taking he had no intention of permanently depriving the owner of his property and was incapable of forming one, and that consequently he was not guilty of the offence charged and dismissed the same ”.

The question which the Divisional Court was asked to answer was : “ whether upon the above statement of facts [the justices] came to a correct decision in point of law ”, which the Court construed as meaning whether there was any evidence to support the justices’ finding.

P. Malcolm Wright, for the appellant.

T. Dewar, for the respondent.

Cur. adv. vult.

January 26.—THE LORD CHIEF JUSTICE: Humphreys, J., will deliver the judgment of the Court.

HUMPHREYS, J. [after stating the facts set out above] : This Court is always loath to disturb a finding of fact by justices and particularly where the finding is in favour of an accused person, but the decision in this case having regard to the evidence does seem to us a startling one. It is to be observed that no attempt was made to show that the respondent formed any intention at the time of the taking, such as an intention to borrow the machine and then return it to its owner. The argument accepted by the justices was that by reason of drunkenness he was incapable of forming any intention at all.

1949.
Jan. 17, 26.

RUSE v.
READ.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

1949.
Jan. 17, 26.

RUSE v.
READ.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

The only evidence in support of that finding was, first of all, that after leaving the public house he walked to the fair ground and round the various side-shows; (2) That he was considerably under the influence of drink when he took the bicycle; (3) That he rode the bicycle apparently without accident for two hours; (4) That he rode it home and then secreted it in the lane behind his mother's house.

The respondent himself in the witness box did not put his case higher than this, "That at the time of taking the bicycle in consequence of his condition he did not realise the significance of having taken it", whatever that may mean.

The decision of the House of Lords in *DIRECTOR OF PUBLIC PROSECUTIONS v. BEARD*, 14 Cr. App. R. 159; [1920] A. C. 479, shows that upon the question of intention evidence of a state of drunkenness rendering the accused incapable of forming the intent necessary to constitute the particular crime should be taken into consideration with the other facts of the case, not because drunkenness in itself is an excuse for the crime, but because the state of drunkenness may be incompatible with the actual crime charged, and may therefore negative the commission of that crime. Can it be said that a man who is able to mount and ride a bicycle for two hours is yet so incapably drunk that he is unable to apply his mind to the simple question whether he intends to take the machine away for good or to borrow and return it? Had there been no other question to be considered, the Court would have found it very difficult to uphold this decision, but Mr. Malcolm Wright has drawn our attention to another aspect of the case perhaps of more general importance. Whatever may have been the state of mind of the respondent on the night of June 30, it is clear beyond dispute that on the next morning not only did he fail to take any steps to return the bicycle to the place from which he had taken it or to inform the police or anyone else that he was in possession of the machine, but on the contrary he did everything in his power to prevent the discovery by the owner of either the machine or the accessories. Nothing could be more indicative of his then intention to deprive Mr. Purchase

permanently of his property. It is equally clear that on the previous evening in taking away the bicycle he had committed a trespass since he had no permission from the owner. The question then arises: Even if the taking on June 30, though unlawful, was not felonious because of the absence of the essential intention, did it become so when that intention was manifested on the following day?

Mr. Malcolm Wright relies upon the case of *RILEY* (1853), 1 Dears. C. C. 149. That was a case in which Riley had put into a field belonging to one Clark twenty-nine of his own lambs, there being already there ten lambs belonging to one Burnside. Early in the morning Riley drove away his twenty-nine lambs and with them one lamb belonging to Burnside. He sold his lambs, and it being pointed out by the purchaser that there were thirty lambs, he completed the sale and received the price of the thirty lambs which he appropriated to his own use. He later denied having done so and told other untruths about the matter. He was indicted for stealing the lamb of Burnside, and the jury returned a verdict as follows: "At the time of leaving the field the prisoner did not know that the lamb was in his flock but that he was guilty of felony at the time it was pointed out to him". Upon a case reserved the Court for Crown Cases Reserved unanimously held that the conviction was right. In the course of the argument Parke, B., put the matter succinctly as follows: "The taking being a trespass, when there is the *animus furandi*, it becomes a felony". Without calling upon counsel for the Crown, Pollock, C.B. (at p. 158), delivered judgment distinguishing some earlier cases and continuing: "In the case now before the Court the prisoner's possession of the lamb was from the beginning wrongful. Here the taking of the lamb from the field was a trespass . . . if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel, *animus furandi*, it is larceny". Parke, B., in his judgment (at p. 158) observed: "The original taking was not lawful. The prisoner being originally a

1949.
Jan. 17, 26.

ROSE v.
READ.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

1949.
Jan. 17, 26.

RUSE v.
READ.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

trespasser, he continued a trespasser all along . . . and being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent, that becomes a felonious trespass". Williams, Talfourd and Crompton, JJ., concurred in that decision. In the case put, where the original possession was rightful, regard must of course be had today to the provision now embodied in the Larceny Act, 1916, making larceny by a bailee punishable; otherwise RILEY'S CASE (*supra*) stands.

It was not new law in 1853; Sir Matthew Hale, in Vol. 2 of his *History of the Pleas of the Crown*, at page 509, writes: "If my servant without my privity takes my horse and rides abroad 10 or 12 miles upon his own occasions and returns again it is no felony, but if in his journey he sells my horse as his own this is a declarative of his first taking to be felonious and *animus furandi*".

Sir Matthew Hale would apparently have approved the decision in RILEY'S CASE (*supra*). It is treated by Sir James Stephen in his *Digest of the Criminal Law* at p. 366, Art. 329, as part of the law of England. In that authoritative work, *Possession in the Common Law*, by Pollock and Wright, in Part 2 (written by Sir Frederick Pollock), at p. 114, the learned author writes: "The judgment of Parke, B., in RILEY'S CASE (*supra*) has now been accepted as authoritative, though not always without reluctance, for more than 30 years"; while in Part 3, written by Sir Robert Wright, afterwards R. S. Wright, J., at p. 142, the case is fully discussed as an important authority, apparently with approval.

ASHWELL (1885), 16 Q. B. D. 190, where the fourteen Judges were equally divided (though as afterwards appeared the difference of opinion was rather upon the facts than upon the law) was also referred to by Mr. Malcolm Wright. The facts in that case were that Ashwell asked Keogh for the loan of a shilling. Keogh gave him what he believed to be a shilling and Ashwell took it under the same belief. Some time afterwards Ashwell discovered that the coin was a sovereign. He

then and there fraudulently appropriated it to his own use. Ashwell being convicted of larceny of the sovereign, Denman, J., reserved the question for the Judges. The only one of the Judges who referred to RILEY'S CASE (*supra*) was Lord Coleridge, C.J., who observed that the conviction in that case was upheld on a ground extremely technical, but regarded it as "an authority under circumstances hardly different from those in the present case for upholding the conviction".

The only other case to which our attention was drawn was the decision of this Court in HUDSON, 29 Cr. App. R. 65; [1948] K. B. 458. In that case the appellant had received by post an envelope intended for some other person. He kept it for some days, and then on opening it he found inside a cheque drawn to J. Hudson, but intended, as he knew, for some other person. He then fraudulently appropriated the cheque. Being convicted of larceny of the cheque, he appealed to this Court. The argument on his behalf was to the effect that, as he had no *animus furandi* when he received the envelope containing the cheque, he could not be convicted. The Court upheld the conviction on the ground that the effective taking of the cheque by the appellant was when he opened the envelope and at once appropriated the contents since, as Charles, J., said in the course of delivering the judgment of the Court (at pp. 71 and 462 of the respective reports), "at that moment for the first time he was in a position—which he had not been before—to form an intent". We agree with that decision.

Being of opinion that the decision in RILEY'S CASE (*supra*) is still good law and binding upon this Court, and that the case is not distinguishable from the present one, our judgment is that the justices misdirected themselves and should have found the offence proved. The case must go back to them with that expression of opinion.

Appeal allowed.

Case remitted.

1949.
Jan. 17, 26.

RUSE v.
READ.

Goddard,
L.C.J.,
Humphreys,
J.
Finnemore,
J.

Solicitors: Crawley & de Reya, agents for J. C. M. Dyke, McLusky & Hughes, Exeter, for appellant; Gibson & Weldon, agents for Chard & Coxwell, Sidmouth, for respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE FINNEMORE.

JOHN THOMAS.

1949.
Jan. 25.

Indictment—Rape—Offences against Road Traffic Act, 1930—Not to be Included in Same Indictment.

Offences under the Road Traffic Act, 1930, should not be included in an indictment for rape or other serious offence.

Application for leave to appeal against conviction and sentence.

The applicant was indicted at Denbighshire Assizes on November 10, 1948, for two rapes committed on the same girl on the same evening, for two charges of taking away a motor car without the consent of the owner, and for dangerous driving. He pleaded guilty to one count for taking away a motor car without the consent of the owner, was acquitted on the other count for that offence, but was convicted on all the other counts. He was sentenced by Pritchard, J., to concurrent terms of 5 years' penal servitude, 12 months' and 12 months' imprisonment.

The girl who was raped was 17 years of age and apparently a perfectly well-conducted girl. She had been to a dance and when coming away from the car park was struck on the back of the neck by the applicant and rendered unconscious. She was then taken by the applicant into a motor car and raped. Later she was taken out of the car by the applicant and raped again. The car, the driving of which formed the subject of the count for dangerous driving, was used by the applicant, at any rate in connection with the second rape.

No counsel appeared.

THE LORD CHIEF JUSTICE: The applicant was indicted for two rapes on the same girl on the same evening. He was also charged, in other counts of the same indictment, with offences against the Road Traffic Act, 1930, namely, two charges of taking away a motor car without the consent of the owner and one charge of dangerous driving. He pleaded guilty to one charge of taking away a car without the owner's consent and was acquitted of the other charge of that nature. He was convicted of both rapes and also of dangerous driving.

The Court thinks it right to say that it does not approve of offences against the Road Traffic Act, 1930, being included in an indictment for rape. It is not desirable that so serious a charge as rape should in any way be complicated by the jury having also to consider a charge of dangerous driving. It is true that in this case the offence of dangerous driving was to a great extent part and parcel of the story, because the car was used, at any rate, in connection with the second rape. It is not suggested that in this particular case any harm was done or any prejudice caused by the inclusion of the charges in one indictment, but we think it right to say that, as a general rule, charges, such as the charges in the present case, under the Road Traffic Act, 1930, should not be included in an indictment for rape or other serious offence. They should be kept quite separate, and, if necessary, the prisoner should be charged and tried on them separately.

[His Lordship then said that in the opinion of the Court there were no grounds for interfering with any of the convictions or with the sentence and that the application must be refused.]

Application refused.

1949.
Jan. 25.

JOHN
THOMAS.

Goddard,
L.C.J.,
Humphreys,
J.,
Finnemore,
J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

CHARLES PORTER.

1949.
Feb. 28.

Betting—User of Premises—Bookmaker—Presence in Bar of Public House—No Localisation in Particular Part of Bar—No Need to Prove Knowledge or Authority of Licensee—Betting Act, 1853 (16 & 17 Vict. c. 119), s. 3.

Costs—Unsuccessful Appellant—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 38 (5).

The appellant was convicted for that on certain days, being a person using the A. A. public house, he used the same for the purpose of betting with persons resorting thereto, contrary to s. 3 of the Betting Act, 1853. During the material time observation was kept on the house by police officers and on several days the appellant was seen in the saloon bar of the public house taking a large number of bets, standing or sitting at different places in the bar.

Held, that for the purposes of the aforementioned section, if a bookmaker makes a habit of using a bar or a room in a public house for the purpose of betting with persons resorting thereto, there is sufficient localisation to show that he is carrying on the business of a bookmaker there, and that it is not necessary that he should always be found to stand or sit in the same place, nor is it necessary to show that the licensee either knew that he was there or permitted him to be there. The conviction was, therefore, right.

MILNE v. CITY OF LONDON POLICE COMMISSIONER, 27 Cr. App. R. 90; [1940] A. C. 1 followed.

DEAVILLE, [1903] 1 K. B. 468 not followed.

POWELL v. KEMPTON PARK RACECOURSE Co., [1899] A. C. 143 considered.

Order for payment of costs by unsuccessful appellant.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on November 2, 1948, of an offence against s. 3 of the Betting Act, 1853, and was ordered by the Deputy-Chairman

to pay a fine of £50 and £21 towards the costs of the prosecution.

The appellant, who was a bookmaker, was indicted for that he on July 14, 1948, and on other days between that date and July 29, being a person using the Abbey Arms public house, Harrow Manor Way, used the same for the purpose of betting with persons resorting thereto. Evidence was given that during the material time observation was kept on the house by police officers and that on five days during the period the appellant was seen in the saloon bar taking bets to the number of 45 in all, standing or sitting at different places in the bar. The issue whether the appellant did this with the knowledge or consent of the licensee was not left to the jury.

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

Edward Clarke, for the appellant :

The Deputy Chairman was wrong in directing the jury that it was unnecessary for the prosecution to prove either that the licensee permitted betting by the bookmaker, or that the bookmaker enjoyed a privileged place in the premises. He wrongly held that "localisation" by the bookmaker at the premises by regular attendance over a period of time was sufficient to establish "user" as defined by the Betting Act, 1853. The "person using" must be a person analogous to and of the same genus as the owner, occupier or manager and he must have at least *de facto* control of the premises. [He referred to *POWELL v. KEMPTON PARK RACECOURSE CO.*, [1899] A. C. 143; *BELTON v. BUSBY AND WOODS*, [1899] 2 Q. B. 380; *DEAVILLE*, [1903] 1 K. B. 468.] The "*ratio decidendi*" of *MILNE AND OTHERS v. CITY OF LONDON POLICE COMMISSIONER*, 27 Cr. App. R. 90; [1940] A. C. 1, was that communication of bets by telephone from a club to a bookmaker did not make the bookmaker a person "using". Those parts of their Lordships' speeches criticising *DEAVILLE* (*supra*) were *obiter*. *DEAVILLE* is still good law, is binding on the Court, and is indistinguishable from this case. There was, therefore, no evidence of a contravention by the appellant of section 3 of the Betting Act, 1853.

Vernon Gattie, for the Crown, was not called on to argue.

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

THE LORD CHIEF JUSTICE: Notwithstanding the very clear and exhaustive argument of Mr. Clarke, the Court is clearly of opinion that this appeal fails.

It is an appeal by a bookmaker who was summoned originally before the magistrates for an offence against section 3 of the Betting Act, 1853, and who elected to go for trial. He was charged before the learned Deputy Chairman at the London Sessions for that "on the 14th day of July, 1948, and on other days between that date and the 29th July, being a person using the Abbey Arms public house, Harrow Manor Way, [he] used the same for the purpose of betting with persons resorting thereto".

Reference may be made to the actual section of the Act. Section 3, which follows on section 1, which prohibits a house, office, room or other place being kept or used for the purpose of betting with persons resorting thereto, provides: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them shall" be guilty of an offence. The material words, therefore, are: "Any person being a person using a house or room for the purpose of betting with persons resorting thereto".

The facts were that from the 14th to the 19th July, 1948, observation was kept on the house and the saloon bar by police officers, and on five days during that period the appellant was seen in the saloon bar taking bets to the number of 45 on different days, standing or sitting at different places in the bar. It is true, also, that he was taking some refreshment during the time that he was in the bar. Our attention has

been called to evidence which shows that the licensee or his employee or wife were always in the bar while the appellant was there, and could see what was going on, but that question was not left to the jury. The learned Deputy-Chairman, in his summing-up, charged the jury in this way: "On the other hand, there seems to be some authority for saying he should be in a privileged position and, on the whole, I have come to the conclusion that it is not necessary for the user to be in the position of receiving permission from the landlord. I do think it is necessary, as Mr. Gattie puts it for the prosecution, that he should be localised, which means that he is in the bar during the racing hours day by day when the police see him and he is not there merely an odd day or so, now and again, but he is doing it as a regular habit, a regular custom, and therefore he makes that place, for the time being, while he is operating, into a betting house and, in that sense, he can be convicted of using it for the purpose of betting."

In the opinion of the Court, that was a correct direction to the jury as the law now stands, whatever it may have been some years ago. There was evidence here that the appellant was, on several occasions within a limited time, using the house for the purpose of betting, and he was seen during those times to take no fewer than 45 bets on one day or another. There was, therefore, evidence for the jury that he was carrying on the business of a bookmaker in the public house, but Mr. Clarke's argument is that owing to the decision in *POWELL v. KEMPTON PARK RACECOURSE COMPANY*, [1899] A. C. 143, and other cases including *DEAVILLE*, [1903] 1 K. B. 648, which was decided in the Court of Crown Cases Reserved, and which would ordinarily be binding on this Court, no offence was committed. His main argument as I understand it—and I think I am doing justice to it—is that it is necessary to show two things. The first is that the appellant was in what the Deputy-Chairman described as "a privileged position", meaning thereby that he was not in the position of an ordinary user of the house, but was permitted by the licensee, expressly or impliedly and with knowledge of what he was doing, to

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
Feb. 28.

CHARLES
PORTER.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

use the house for the purpose of betting. As there was no evidence left to the jury and no finding by the jury either that the licensee permitted him to do it or that the licensee knew that he was doing it, therefore, says Mr. Clarke, the direction was wrong and the conviction was wrong.

Secondly, he submits that there must be evidence that the appellant was localised, in this sense, that he must have been standing or sitting in some particular place in the saloon bar, and that it is not enough if he was merely in the saloon bar, though why, if the requirement of using the house is enough, he should have to stand or sit in any particular place or in any room, I find some difficulty in following.

Mr. Clarke has contended that this case is concluded by authority, and he relies more particularly on the speech of Lord Halsbury in *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*), about which I will say only this: It is not necessary, I think, for this Court now to consider *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*), for the reason that it has much more recently, namely in 1939, been explained by the House of Lords in *MILNE v. CITY OF LONDON POLICE COMMISSIONER*, 27 Cr. App. R. 90; [1940] A. C. 1. One part of Lord Halsbury's speech in the House of Lords, however, ought to be noticed. He was dealing there with whether Tattersall's Ring at Kempton Park could be a "place" within the meaning of this Act, and he held that it was not and that was the decision of the majority of their Lordships. However, in the speech which he as Lord Chancellor delivered, which was of course the leading speech in the case, he expressly (at p. 163) referred to the judgment of A. L. Smith, L.J., when the case was in the Court of Appeal, and described it as an illuminating judgment. It is worth noting that A. L. Smith, L.J., said in that case ([1897] 2 Q. B. 242, at p. 279): "I do not propose to deal with the numerous cases which have arisen about the user of rooms at public houses by betting men when carrying on their business of betting with persons resorting thereto, for the words 'house' and 'room' are specifically mentioned in the Act as two of

the prohibited places, when used by a betting man for the carrying on the business of betting therein, and in my judgment these cases have no application to betting in an inclosure at a racecourse in the usual way as in the present case". When one remembers that *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*) was dealing merely with betting in Tattersall's Ring at a racecourse, it is impossible to suppose that the noble and learned Lords who formed the majority in that case meant to say that all the public house cases, as the Lord Justice called them, were wrong. His judgment was cited and noted for special approval by the Lord Chancellor, and one finds a distinct expression of opinion by the Lord Justice that the Court was not considering cases such as the present one, that is to say, cases of people betting in public houses, and that the decision was not intended to throw any doubt upon them. It must be remembered that the Court of Appeal in that case (Rigby, L.J., dissenting) had come to the same decision on the point before them, as did the House of Lords.

That case having been decided, a variety of other cases followed. One of the cases to which we have been referred was *BELTON v. BUSBY AND WOODS*, [1899] 2 Q. B. 380, in which the facts were that "a bookmaker was in the habit of attending at the bar of a licensed beerhouse daily at certain hours for the purpose of betting with persons resorting thereto, and he carried on there a business of ready-money betting with the knowledge and permission of the licensed occupier of the beerhouse" and it was held that the bookmaker used the bar of the beerhouse for the purposes prohibited by the Act. Mr. Clarke has relied on the judgment of Grantham, J., in that case, who followed in terms the decision in the *KEMPTON PARK CASE* (*supra*). There, there was knowledge on the part of the licensee, and the learned judge said this (at p. 383): "There is, it seems to me, this great distinction between the racecourse cases, such as *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*), and the present, that in the former the bookmakers and the members of the public who bet with them go into the

1949.
Feb. 28.

CHARLES
PORTER.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

racecourse inclosures on exactly the same footing; the place is open to them both on the same terms; the one has no greater right to be there than the other. But that was not the case here. The bookmaker, Woods, had something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business over and above the right of an ordinary member of the public to resort there. This seems clear from the findings of the magistrate. The case finds that he was allowed to remain there regularly for certain hours every day". There, the learned Judge had no difficulty in saying that that case was distinguishable from *POWELL v. KEMPTON PARK RACECOURSE COMPANY (supra)*, and he was applying the very passages in Lord Halsbury's speech upon which so much reliance has been placed by Mr. Clarke. Bruce, J., did not rest his judgment on that ground at all. He followed the ground mentioned by A. L. Smith, L.J., to which I have just referred and which was cited with approval in the House of Lords in *POWELL'S CASE (supra)*. Bruce, J., said (at p. 384): "I think that the room, the saloon bar, was used by Woods for the purpose of betting with persons resorting thereto. I think that Woods was a person using the room in the sense that he regularly resorted there for the purpose of carrying on the betting business, and was the person in control of that business"—that is to say, the betting—"Therefore, I entertain no doubt that he was guilty of an offence against the Betting Act". He held that the bookmaker in that case would be guilty of an offence.

The next case to which it is necessary to refer is the much canvassed case of *DEAVILLE*, [1903] 1 K. B. 468. That was a case in the Court of Crown Cases Reserved, and there is no doubt that the Court in that case did hold that there could not be a conviction unless it could be shown that the bookmaker was carrying on his betting there with the consent express or implied of the licensee, and as it had not been proved in one of the cases that the licensee had knowledge that the man was carrying on the business of a bookmaker the conviction was quashed. If that case had stood alone,

it may be that it would have been decisive of this case, because that case would be in the ordinary way binding on this Court, and it would be difficult indeed to distinguish the facts in that case from those in this case. But when one finds that a case has been expressly over-ruled by the final Court of Appeal, or that its governing facts have been regarded in a totally different manner by the final Court of Appeal so that it is obvious that in the opinion of the final Court of Appeal the case was wrongly decided, then whether that Court has in terms said that it over-rules the case or not, in our opinion, this Court ought to treat the case as over-ruled. I may cite what Lord Wright said in *NOBLE v. SOUTHERN RAILWAY CO.*, [1940] A. C. at p. 598, when he dealt with this very sort of point. That was a case under the Workmen's Compensation Act, and the Court of Appeal, when the case came before them on appeal from the County Court Judge, though they felt that they would have decided the case one way, felt bound by an earlier decision of the Court of Appeal to dismiss the appeal instead of allowing it, though there were many cases in the House of Lords which showed that the reasoning which led the Court of Appeal on an earlier occasion to decide the case as they did decide it was erroneous. Lord Wright said (at p. 598): "I feel no doubt that the decision of the Court of Appeal was wrong. I can understand the difficulty in which both the County Court Judge and the Court of Appeal were placed in the present case. What a Court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by this House and refuse to follow the erroneous decision".

If I may say so with respect, I feel exactly the same thing. If we find that the House of Lords has given a decision which is manifestly inconsistent with an earlier decision of a Court from which an appeal lies to the House of Lords, when a subsequent case comes before this Court, whether there has been an express over-ruling of the earlier case or not, we ought

1949.
Feb. 28.

CHARLES
PORTER.
—
Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
Feb. 28.

CHARLES
PORTER.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

not to follow it if it is manifestly inconsistent with the decision in the House of Lords. But one member at least of the House of Lords in *MILNE'S CASE* (*supra*), said that *DEAVILLE* (*supra*), was wrongly decided; and when one comes to examine the speeches of the noble and learned Lords who took part in the debate in the House in *MILNE'S CASE* (*supra*), it is quite obvious that none of them approved of the decision in *DEAVILLE* (*supra*), but all thought it was wrong. Therefore, whether or not there has been a formal over-ruling of *DEAVILLE* (*supra*) by all the members of the House or a majority of the House, or whether only one member has said that that earlier case was wrongly decided, but this Court can see that all the noble and learned Lords who took part in the debate found that the reasoning was wrong, it follows that this Court ought to follow the decision of their Lordships in the later case. In *MILNE v. CITY OF LONDON POLICE COMMISSIONER* (*supra*), the actual point that fell for decision there was whether a bookmaker who used a telephone for the purpose of communication between his office and a particular club, taking bets and laying the odds by means of telephone messages, could be said to be using the club for the purpose of betting. Their Lordships came to the conclusion that no offence in those circumstances had been committed because they held that it is impossible to say that a person uses a house merely because at one end of a telephone he telephones to that house. They pointed out how absurd it would be to say that a man who telephoned from Liverpool to a house in London was using that house. He might send orders to that house for the purposes of business. He might order goods to be sent to Liverpool from London, or might arrange terms for sending goods from Liverpool to London, or New York to London, but nobody could say that a person in Liverpool telephoning to New York was using the house in Liverpool because he telephoned from it or received messages in it.

That was, no doubt, the actual decision in *MILNE v. CITY OF LONDON POLICE COMMISSIONER* (*supra*), but every one of their Lordships found it necessary in that case to examine at length

what the word "user" meant and what amounted to user; and if it became necessary to examine that question, as it has been shown by their speeches that it did, I think it would be wrong to say that the observations made on that matter were *obiter*; indeed I think they form part of the decision of the House.

When we look at *MILNE v. CITY OF LONDON POLICE COMMISSIONER* (*supra*), it is, I think, clearly conclusive of this case, and it disposes once and for all of many of the difficulties which Lord Halsbury's speech in *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*) caused. It was necessary to get the consideration of *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*) again before the House of Lords. It was for that reason, no doubt, that the Attorney-General gave his fiat for *MILNE'S CASE* (*supra*) to be taken from this Court to the House of Lords, because only the House of Lords can explain another judgment of the House of Lords. They pointed out that Lord Halsbury's speech must not be taken to decide things which in their opinion it did not decide, although at first sight I can well understand, as their Lordships could, the difficulties caused by some of the expressions which he used. In that case, the Lord Chancellor, Lord Maugham, said this (27 Cr. App. R. at p. 111; [1940] A. C. at p. 18): "My Lords, I think we are driven to the conclusion that the owner or other persons in control of the place, who open, keep or use it for the first purpose mentioned in s. 1 of the Act, are only doing something illegal if the 'user' is one which involves that the betting with persons resorting thereto is carried out by the owner, occupier or keeper, or by a person using the place in a popular sense, who if not present by himself or some agent or nominee, is permitted to exercise, or in fact exercises, some *de facto* control or some privilege or right over the place in question not being a control, privilege or right possessed by the public at large. Such a conclusion might be arrived at if the owner, occupier or person using the place received a commission on the bets, or if they permitted the bookmaker to install and use a private telephone, or if

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.
Birkett, J.

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

they allowed him to stand outside at an open window and to call out the odds". Then he deals with certain other illustrations. In those last words the noble and learned Lord was dealing with a case where a man could be said to be using the premises though he was not actually physically present. But I think it is equally clear that he means that a person uses a place for the purposes of this Act if he uses it in the popular sense, and there is no more popular sense of the word "use" than when it is said that a man "uses" a particular licensed house, meaning that he is frequently to be found there.

When we get to the speech of Lord Atkin, he puts it much more emphatically. He explains *POWELL v. KEMPTON PARK RACECOURSE COMPANY* (*supra*) (27 Cr. App. R. at p. 118; [1940] A. C. at p. 25). I am not going to read the whole of his speech because anyone interested in the case can read it himself. The noble and learned Lord there says: "The present case does not raise the question whether the premises in question are a place within the meaning of the Act, the debated question which is supposed to have been decided in *POWELL v. KEMPTON PARK RACECOURSE COMPANY, LTD.* (*supra*)"—meaning that that was the real question which the House decided, whether the place there was a "place" within the meaning of the Act. Then he says (27 Cr. App. R. at p. 119; [1940] A. C. at p. 26): "So in the public house cases I cannot see why, if the bookmaker uses the bar of the public house for betting in conditions which make it an offence if committed with the permission of the licensee of the premises, exactly similar user fails to be an offence if done without the licensee's permission. The user appears to be the same in both cases. I think therefore that *DEAVILLE* (*supra*), and the cases that followed it, were wrongly decided so far as they laid down the test of permission by the occupier". With such an emphatic pronouncement as that by one of the noble and learned Lords, it would certainly be a strong thing for the Court to say that that dictum was merely *obiter* and that we were not going to follow it.

Later he says (27 Cr. App. R. at p. 121; [1940] A. C. at p. 27): "My Lords, one would agree that if the bookmaker stood at the door and made his bets verbally with the members he would be using the premises for betting with the members. It cannot matter whether it was during the whole afternoon or less, and it cannot matter whether he did so with the permission of the owner or not". Then he goes on to say that he disagrees with the idea that conversing on the telephone is analogous. Then, he says (27 Cr. App. R. at p. 121; [1940] A. C. at p. 28): "I also think that he"—that is the bookmaker—"can be said to be using the premises if he has such a degree of control over them that it can be said that the premises are a place where he is carrying on his betting business. I do not think that he need have any legal right of occupation; or that he need be a partner with the actual occupier. Payments made to the occupier or keeper or user of the premises either by way of commission or otherwise for the privilege of betting with the persons resorting to the premises, the installation by the bookmaker on the premises of facilities for betting with him, such as a private telephone or possibly a private letter-box"—and so on—"might well afford evidence on the question of fact whether the bookmaker was, in fact, carrying on his business on the premises".

Later he tells us what is the question for the jury (27 Cr. App. R. at p. 123; [1940] A. C. at p. 29): "The question then to be considered by the tribunal of fact, whether justices or jury, when a charge is made that a bookmaker has used premises for the purpose of betting with persons resorting thereto, is the same whether the bookmaker has been actually present on the premises or not. Has he, in fact, been carrying on his betting business there betting with persons resorting thereto?"

Lord Macmillan agreed with both the Lord Chancellor and Lord Atkin, and Lord Wright dealt with the case at considerable length because all the other members of the House had set out all the facts. Having made reference to Lord Halsbury's speech in *POWELL v. KEMPTON PARK RACECOURSE*

1949.
Feb. 28.

CHARLES
PORTER.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
Feb. 28.
—
CHARLES
PORTER.
—
Goddard,
J.C.J.,
Humphreys,
J.,
Birkett, J.

COMPANY (*supra*), he says (27 Cr. App. R. at p. 129; [1940] A. C. at p. 41): "It is not clear, but I shall here assume, that Lord Halsbury's speech represented the opinions of the majority of the House. It may be that these words would, if taken in their full and literal significance, at once rule out Payne from the category of a person using the club premises. But equally they would rule out other cases where the offence has been held to have been committed, rightly as I think, such as the case of the bookmaker who used a slag heap on waste land as the place for his betting business, or the workman in Scotland, who, without the knowledge or permission of his employers, used the room in which they were allowed to have their dinner to conduct a betting business with his fellow workmen", and he quotes the decision in *YOUNG v. DARRAH*, [1929] S. C. J. 17, and says: "I agree with that decision. A like case would be that of a bookmaker who, without the permission of the publican or any authorised agent of his, carried on his betting business in the bar of the public house. Permission is, I think, immaterial in cases of this type, if in fact the place is used for the prohibited purpose. The offence may be committed by a licensee or by one who is not even a licensee and has no permission from the occupier".

Then comes the speech of Lord Porter, and he deals with *POWELL'S CASE* (*supra*), in this way (27 Cr. App. R. at p. 137; [1940] A. C. at p. 49): "That case is primarily a decision as to what is a 'place', and determines that Tattersall's ring, in which many bookmakers congregate, is not a place within the meaning of the Act inasmuch as no bookmaker, though usually to be found at a particular spot, takes his stand at an individual place, nor has any particular spot been allotted to him. He is free to bet on any part of the course and, though the owners of the course know that he goes to Tattersall's ring, yet they do not set aside any particular part of the course for his use". Then he deals with *HAWKE v. DUNN*, [1897] 1 K. B. 579, and says: "In neither case, however, was any *de jure* user proved—the bookmaker had no

more rights in the ring or elsewhere on the course than any other member of the public; and no *de facto* user was established because no particular place was set aside for or used by any particular bookmaker". Throughout the whole of his speech it is clear that he is of opinion it is not necessary for there to be any *de jure* occupation of any particular place, and he, I think, like the other learned Lords, says that a distinction is to be drawn between a place like a ring on the racecourse and the words mentioned in the Act "any house, office, room, or other place".

In these circumstances, I think it must no longer be thought that *DEAVILLE'S CASE* (*supra*) is good law. It must be taken to be over-ruled by *MILNE v. CITY OF LONDON POLICE COMMISSIONER* (*supra*), and it must be taken to be the law that if a bookmaker uses, that is to say, makes a habit of using the bar of a public house for the purpose of betting he is committing an offence against the Betting Act. It is not necessary that he should be found always to stand in exactly the same place. If he is in the saloon bar, that is a sufficient localisation—to use the word used in these cases—to show that he is carrying on his business there. A man can carry on his business at one end of the room, just as well as at the other. It is sufficient localisation if he is found in a room. A saloon bar for this purpose is a room, and I do not think any difficulty arises there. Nor is it necessary to prove, although no doubt it can very often easily be proved, that the licensee either knew he was there, or permitted him to be there. If the bookmaker is found there, carrying on the business of betting, that is enough to constitute the offence. But that does not mean that a man who is not carrying on a bookmaker's business but merely takes a casual bet or makes a casual bet with another commits an offence, because that would be no evidence that he was carrying on the business of a betting house. But if the facts found in this case are proved it follows that an offence has been committed. That, in the opinion of this Court, is the result of *MILNE v. CITY OF LONDON*

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
Feb. 28.

CHARLES
PORTER.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

POLICE COMMISSIONER (*supra*), and accordingly the appeal fails.

There is one other matter with which the Court thinks it should deal. The defendant in this case, as he was entitled to do, elected to go for trial. If he had not so elected, the case would have been dealt with by the magistrate. Then, if he desired to appeal to test the case, as we are told he did, the case would have been tested by means of a Case, which would have been stated and come before the Divisional Court, and if it failed on the point of law the defendant would have had to pay the costs.

Under the new Criminal Justice Act, 1948, s. 38 (5), it is provided that: "The Court of Criminal Appeal may, when they dismiss an appeal or application for leave to appeal, order the appellant or applicant as the case may be to pay the whole or any part of the costs of the appeal or application". We think in this case that we ought to use that power because, as I have said, if the appellant had not elected to go for trial, the way of testing this question of law would have been by way of Case Stated, which would have come before the Divisional Court (probably consisting of the same members) and if he had failed he would have had to pay the costs.

In these circumstances, when a bookmaker brings up a question of this sort which he thinks is important, and on which he wants and gets a decision, although it is a decision which is adverse to him, we think he ought to pay the costs. Accordingly, we dismiss the appeal and order him to pay the costs.

Appeal dismissed.

Order that appellant pay costs.

Solicitors: Good, Good and Co., for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

BERNARD EDWIN GOMER.

1949.
March 8.

Sentence—Subsequent Alteration—To be Stated Publicly in Court.

It is desirable that, where it is possible, any subsequent alteration of a sentence already passed should be stated publicly in Court.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Merthyr Tydfil Borough Quarter Sessions on January 6, 1949, to garagebreaking and larceny and was sentenced by the Recorder to nine months' imprisonment to run consecutively to a sentence of two years' imprisonment which the applicant was already serving. Several outstanding charges were taken into consideration.

When the Recorder pronounced sentence, he imposed a sentence of twelve months' imprisonment, but subsequently altered the sentence to one of nine months' imprisonment.

No counsel appeared.

BIRKETT, J.: This applicant applies for leave to appeal against a sentence of nine months' imprisonment at the Merthyr Tydfil Quarter Sessions, that sentence to run consecutively to a sentence of two years' imprisonment imposed at the Brecon Quarter Sessions which he was then serving.

When the learned Recorder sentenced the applicant, he said: "The sentence of the Court upon you is that you be kept in prison for twelve months, and that to be consecutive to the sentence which you are serving at the moment". It appears that, although the sentence was pronounced in Court, there was a subsequent alteration to the sentence of nine

1949.
March 8.

BERNARD
EDWIN
GOMER.
—
Goddard.
L.C.J.,
Humphreys,
J.,
Birkett, J.

months' imprisonment which is stated by the applicant in the grounds of his application. It was, of course, perfectly competent to the learned Recorder to alter the sentence, but this Court thinks that where it is possible—it is, of course, not always possible—any subsequent alteration of a sentence should be stated publicly in Court. It matters not in this case, because the considered opinion of this Court is that, whether the sentence were one of nine months' imprisonment or one of twelve months' imprisonment, the application would have to be refused. [His Lordship then referred to the facts of the case.]

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

1949.
March 24.

JOSEPH HENRY BROOK.

Sentence—Fine—Order that Prisoner Remain in Custody till Fine Paid—New Procedure now Introduced—Sentence Quashed—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 14 (1), (2).

By the Criminal Justice Act, 1948, s. 14 (1): "Subject to the provisions of this section, where a fine is imposed by . . . a Court of assize or quarter sessions, an order may be made in accordance with the provisions of this section—(a) allowing time for the payment of the amount of the fine . . . (b) directing payment of the said amount by instalments of such amounts and on such dates respectively as may be specified in the order; (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered. . . : Provided that any term of imprisonment fixed under this subsection in default of payment of a fine shall not exceed 12 months".

The appellant pleaded guilty at quarter sessions to larceny, and was ordered by the Recorder to pay a fine of £25 and £10 towards the costs of the prosecution. The Recorder ordered

that he should remain in custody until the amount of the fine was paid. The appellant, being unable to pay, remained in custody for 25 days.

Held, that s. 14 (1) of the Act of 1948 introduced a new procedure with regard to the imposition of fines by Courts of assize or quarter sessions; that under it it was open to the Recorder to make an order under one or more of paras. (a), (b) and (c) of the subsection, but that it was no longer open to him to make the order which he did make; and that in the circumstances the sentence should be quashed.

Observations on s. 14 (2) of the Criminal Justice Act, 1948.

Appeal against sentence.

The appellant pleaded guilty at Grimsby Quarter Sessions on January 10, 1949, to larceny, and was sentenced by the Recorder to a fine of £25 and ordered to pay £10 towards the costs of the prosecution. The Recorder ordered that the appellant should remain in custody till the fine was paid. The appellant remained in custody for 25 days, and the Recorder then directed the Governor of the prison to discharge him on his entering into a recognisance to appear at the next sessions.

T. H. K. Berry, for the appellant :

Section 14 (1) of the Criminal Justice Act, 1948, now regulates the procedure with regard to the imposition of fines by Courts of quarter sessions or assize. Three methods are provided in (a), (b) and (c) for the levy of the fine, (c) expressly providing that the Court may fix a term of imprisonment which the person liable to make the payment is liable to undergo if any sum which he is liable to pay is not duly paid or recovered. The proviso expressly fixes the maximum term of imprisonment at twelve months. By committing the appellant to prison for an indefinite period the Recorder failed to comply with the terms of the proviso, because either he did not fix a term of imprisonment or, if it can be said that an indefinite term is still a term of imprisonment fixed by the Court, *non constat* that the term would not exceed twelve months. The Court has power in circumstances such as the present to pass a substituted sentence under s. 5 (2) of the Criminal Appeal

1949.
March 24.

JOSEPH
HENRY
BROOK.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
March 24.

JOSEPH
HENRY
BROOK.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

Act, 1907, but it is not bound to do so; it may simply quash the sentence passed, and as the appellant has already spent 25 days in prison, it is submitted that that course might be taken.

S. L. Elborne, for the Crown:

The course adopted by the Recorder cannot be supported, and the only question appears to be whether the Court will exercise its powers under s. 5 (2) of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: The appellant, who has been given leave to appeal, pleaded guilty before the Recorder of Grimsby to a charge of the theft of some ship's stores. He was a ship's cook, and he came ashore with a pound of pork, $\frac{3}{4}$ lb. of bacon, $\frac{3}{4}$ lb. of white flour, $2\frac{1}{2}$ lbs. of fruit and $3\frac{1}{2}$ lbs. currants, together of the value of 10s. 9d., so probably it could not have been a very good piece of pork.

The learned Recorder, having heard the appellant's character, which certainly was not without blemish, though it is only fair to say that since his last conviction he had got the post as a ship's cook and given satisfaction, said that he was not going to send the appellant to prison. He said: "Luckily for you it is not a serious matter. I regard the crime as being more greed than anything else. Merely because you are pleading guilty to what is in fact a criminal offence I am not going to sentence you for your record. I don't think it would be right. I am not going to send you to prison at all. If it was a serious case, I would send you to penal servitude. I would not think of imposing on you a small prison sentence, and I don't think I should be right, in the discharge of the duty I have, to impose a substantial prison sentence on you. I am going to impose a fine on you, as I am entitled to do, of £25, and you will pay £10 towards the cost of the prosecution; and you will remain in custody till it is paid". His counsel (Mr. Macmillan) said: "My client can raise, I think, £10, tomorrow if not today, and I was going to ask—(The learned Recorder): I am not entering into any instalment plan".

Counsel then said : “ I would suggest it should be looked upon as a section 14 matter ”—that is, section 14 of the Criminal Justice Act, 1948—“ (The learned Recorder) : If you came to me at the end of the day, and said he had paid his fine and wanted a little time to find the costs—(Mr. Macmillan) : The difficulty is that he lives in Leeds. (The learned Recorder) : Then the difficulty must be overcome; I am not letting him free from this Court ”. If the learned Recorder thought he had any power to keep the appellant in custody for non-payment of costs, he was wrong, and so the Clerk of the Peace seemed to think, because in drawing up the conviction he drew it up in the form that the appellant was to be kept in prison till the fine was paid, but no reference was made to the costs being paid.

The rest of the history of this case is rather remarkable. It appears that the learned Recorder adjourned the quarter sessions *sine die*, and on the 3rd February, the prisoner, having been in custody by that time for 25 days, wrote to the learned Recorder. Thereupon the learned Recorder assumed the power—what power he had got, I do not know—of directing the Governor of the gaol to release the prisoner on his entering into a recognisance to appear at the next quarter sessions.

Under the old practice before 1948, with the single exception of manslaughter, a Court of assize or quarter sessions had no power to impose a fine for felony, though for misdemeanour a Court could always fine, and there seems to be no doubt that Courts constantly ordered a prisoner to remain in custody until the fine was paid. The reason for that was, in my opinion, this : The prisoner being in custody, the Court did not discharge him, but imposed a fine and said no more. That fine having been imposed, it was the duty of the prisoner to pay it if he could, and if he could not he was in the position of a debtor to the Crown. He would then have to petition the Crown to let him out of prison and forgo the penalty. The Crown could do what it liked. In point of fact, one knows quite well that cases where a prisoner was in custody for non-payment of a fine were reviewed from

1949.
March 24.

JOSEPH
HENRY
BROOK.

—
Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
March 24.

JOSEPH
HENRY
BROOK.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

time to time, and instructions were given either by the Home Office or other appropriate authority to release the prisoner when it was thought that he had been in prison long enough, probably with the consent of the Treasury. That course was adopted whether it was a question of non-payment of a fine or of an amount due under a recognisance. I have known in my own experience cases where a person had entered as surety into a recognisance that somebody would prosecute an appeal at quarter sessions, and the person did not prosecute his appeal and disappeared so that there were no means of getting costs out of him, and the unfortunate surety found himself in prison because he entered into a recognisance and had not discharged it.

Then there was an Act passed in the reign of George IV, the Levy of Fines Act, 1822 (3 Geo. 4, Ch. 46). Under s. 2 of that Act there were provisions for the Clerk of the Peace—and under the Queen's Remembrancer Act, 1859, the same procedure applied to assizes—allowing the prisoner to depart, and then, if the prisoner did not pay, the roll, together with a writ of *distringas* and *capias*, was sent to the sheriff, and the sheriff would take the body of the prisoner and imprison him as a debtor to the Crown. Then the prisoner was released when the Crown saw fit to release him. That has been done in many cases, certainly in the experience of the members of the Court. A fine, perhaps a very substantial fine, has been imposed, and the prisoner has been allowed to go to give him an opportunity of raising the money, and then, when he has failed to pay, the sheriff has taken his body.

In this case, the learned Recorder imposed a fine of £25 on the appellant, and ordered him to remain in custody till it was paid. How he could assume that a man in his position remaining in custody could find £25, I do not know, but that is what he did. We have to consider what is the proper practice to be followed, and the course, as we think, laid down by statute.

Under the Criminal Justice Act, 1948, the Court for the first time has power to fine for felony, so it is all the more

necessary to see that the procedure of the Act is properly followed. Courts, on indictment, can now fine for felonies, which previously they had not the power to do, so it is reasonable to suppose that there will be more cases of fines inflicted at assizes and quarter sessions than has hitherto been the case. Section 14 of the Act provides: "Subject to the provisions of this section, where a fine is imposed by, or a recognisance is forfeited before, a court of assize or quarter sessions, an order may be made in accordance with the provisions of this section". This clearly refers to all fines, whether for felony or misdemeanour. The provisions are these: "(a) allowing time for the payment of the amount of the fine or the amount due under the recognisance; (b) directing payment of the said amount by instalments of such amounts and on such dates respectively as may be specified in the order; (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered; (d) in the case of a recognizance, discharging the recognizance or reducing the amount due thereunder: Provided that any term of imprisonment fixed under this subsection in default of payment of a fine shall not exceed twelve months".

It is true that the words of the section are "an order may be made", but it seems to this Court that this section is inconsistent with the law that existed with regard to the payment or recovery of fines before the Act was passed, and we therefore, in accordance with the well-known principles of construction, construe it as a section which alters the law and now lays down a new procedure. It is desirable that the attention of Courts of quarter sessions should be called to this so that they may know what is the proper course to pursue in the future. When they are giving a convicted person the opportunity of paying a fine instead of going to prison, they should make one, at any rate, of the three orders which they can make under paragraphs (a), (b) or (c) of that section. They can say: "We fine you so much, and you may have a month to pay it". They can say: "We fine you so much,

1949.
March 24.

JOSEPH
HENRY
BROOK.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
March 24.

JOSEPH
HENRY
BROOK.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

and it is to be paid by three instalments". Then they can go on and say: "You will be imprisoned for such-and-such a time, not exceeding twelve months, if any sum you are liable to pay is not duly paid". In that case, if the amount is not paid in accordance with the order made under clauses (a) or (b), proceedings can be taken and the person fined will have to undergo the sentence. In a case in which the Court does not think it appropriate to give time or to allow the fine to be paid by instalments, it can pass the simple sentence, a fine of so much and, in default, so many months' imprisonment. In that case, as neither time nor instalments are allowed, the sentence will begin to run forthwith, but the prisoner can obtain his discharge at any time by paying the fine as provided by s. 15 (5) (b).

There is another subsection, s. 14 (2), which provides: "Any order under this section may be made by the Court by which the fine is imposed or before which the recognizance is forfeited; and (subject as hereinafter provided) an order under this section providing for any such matters as are mentioned in paragraph (a) or paragraph (b) of the foregoing subsection may be made (a) where the fine was imposed or the recognizance forfeited by or before the Central Criminal Court, by a Judge of that Court upon application made in writing to the Clerk of the Court; (b) where the fine was imposed or the recognizance forfeited by or before any other Court of assize, by a Judge of the High Court upon application made in writing to the clerk of assize", and a similar provision in the case of quarter sessions, "by the chairman or any deputy-chairman of that Court, or by the Recorder or Deputy Recorder, as the case may be, upon application made in writing to the clerk of the peace; and may amend any previous order made under this section so far as it provides for those matters". That subsection, in the opinion of the Court, provides for the case in which a Court has made an order in the first instance, and then the defendant desires to ask the Court, in its discretion, to vary the order. For instance, the Court may have imposed, let us say, a fine of £50, to be paid in two instalments. The

defendant finds that he can pay the first, but he cannot pay the second instalment. He will then run the risk of having his body taken and being imprisoned in default, but he can under this subsection apply and ask the Court to vary its original order and give him more time; or he can ask that, instead of paying the second instalment in one lump, he may be allowed to pay it in two or three sums, as the case may be. Then it is expressly provided: "no application shall be made under paragraphs (a) to (c) of this subsection after the refusal of a previous application made thereunder". The defendant can, therefore, apply once only, and if the Court refuses the application, he will have to undergo the sentence of imprisonment passed in default. If a fine is imposed, but no order is made as to imprisonment, on default the defendant cannot thereafter be taken and imprisoned, but the sheriff might be able to seize his goods to satisfy the fine.

Section 15 deals with the enrolment of fines or recognizances under s. 32 of the Queen's Remembrancer Act, 1859, that is, fines at assizes, or under s. 2 of the Levy of Fines Act, 1822, which deals with fines imposed by Courts of quarter sessions. I do not think it necessary to refer to that section any further because it is really a machinery section which deals with making up what is commonly called the estreat roll.

In the circumstances, we have come to the conclusion that the sentence imposed by the learned Recorder was a wrong sentence. He had no power after the coming into force of s. 14 of the Act of 1948, which was in force at the time when he passed that sentence, to pass any such sentence. Although it has been truly said, that if a sentence which cannot stand in law has been passed, this Court has power to alter the sentence and pass a sentence which could be lawfully passed, we think in this case the appellant has been sufficiently punished for what he did. We therefore quash the sentence, and set aside the recognisance into which the appellant has entered to appear before the learned Recorder, and he therefore goes free from today.

1949.
March 24.

JOSEPH
HENRY
BROOK.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

Sentence quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

WILLIAM DANIEL GARTH.

1949.
March 25.

*Summing-up—Receiving Stolen Property—Recent Possession—
Explanation by Prisoner.*

On a charge of receiving stolen property, the most satisfactory form of direction with regard to recent possession is that, where property recently stolen is found in the prisoner's possession, and he fails to give any explanation, that is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen; but that if he gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the case has not been proved to the satisfaction of the jury, and the prisoner is entitled to be acquitted.

ABRAMOVITCH (1914), 11 Cr. App. R. 45 explained.

Application for leave to appeal against conviction.

The applicant was convicted at Leeds Quarter Sessions on January 6, 1949, of receiving stolen property, and was sentenced by the Recorder to 18 months' imprisonment.

No counsel appeared.

THE LORD CHIEF JUSTICE: The applicant was convicted at Leeds City Quarter Sessions of receiving stolen cloth and sentenced to 18 months' imprisonment. There is nothing in the case at all so far as the application for leave to appeal is concerned. The applicant was charged with stealing and alternatively with receiving 64½ yards of cloth which had been stolen from a stationary car in Leeds some time between 3.30 and 6 o'clock in the afternoon. About 6 o'clock the applicant was seen with another man carrying this roll of cloth, and dumping it in some place nearby. He was positively identified as the person who had then been seen with

the roll of cloth, and consequently he was properly convicted of receiving. His notice of application for leave to appeal, which is mere argument, I need not consider, because there is nothing in it.

The only point in the case is that the learned Deputy-Recorder in summing-up stated the law far too favourably to the prisoner. He was dealing with ABRAMOVITCH'S CASE (1914), 11 Cr. App. R. 45, which seems so often to cause some sort of difficulty. The learned Recorder stated the law in this way: "Anyway, the prosecution have to prove guilty knowledge, and in the absence of any explanation by the accused man you are entitled to convict him of receiving stolen goods knowing them to have been stolen, if he fails to give an explanation which you can possibly believe. If, on the other hand, he gives an explanation, and that is one which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted".

That was stating the law far too favourably because, of course, any explanation may possibly be true. That is not in the least what ABRAMOVITCH'S CASE (*supra*) lays down. I have more than once endeavoured to say what ABRAMOVITCH'S CASE (*supra*) does lay down, and it is this: Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possibly be true, because as I have said, any account may possibly be true. A much more accurate direction to the jury is: "If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction".

1949.
March 25.

WILLIAM
DANIEL
GARTH.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
March 25.

WILLIAM
DANIEL
GARTH.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

If quarter sessions would bear that simple fact in mind. I think a good deal of the confusion which, somehow or other, arises through an attempt to lay down the law in accordance with ABRAMOVITCH'S CASE (*supra*) will be avoided.

Application refused.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE BIRKETT AND
MR. JUSTICE FINNEMORE

1949.
April, 6, 7, 8.

PERCY DALTON (LONDON), LTD.
JACK DALTON
JOSEPH STRONG

Attempt to Commit Crime—Charges of Selling and Buying in Excess of Maximum Price—Each Transaction Completed—Acquittal of Full Offence in Each Case—Convictions of Attempts—Convictions Quashed.

A step on the way to the commission of what would be a crime, if the step were pursued to completion, may amount to an attempt to commit that crime to which the step, unless interrupted, would have led; but a step on the way to the doing of something, which is thereafter done and which does not constitute a crime, cannot be regarded as an attempt to commit a crime.

The appellant company was charged in a number of counts with selling, and the individual appellants with buying, pearls in excess of the maximum permitted price. In each case the particular transaction was carried through to completion. In each case the jury acquitted both the appellant company and the individual appellants of the full offence with which they were respectively charged, but on a number of counts convicted the appellant company and the individual appellants of attempting to commit the offence with which they were respectively charged.

Held, that, as the verdict of the jury must be taken to mean that in no case did the completed transaction constitute an infringement of the Order, none of the convictions of an attempt to commit the offence charged could stand.

Appeals against conviction.

The appellant company was convicted at the Central Criminal Court on October 26, 1948, on seven counts of attempting to sell pears in excess of the maximum price permitted by the Imported Pears Order, 1946, and was ordered by the Commissioner to pay a fine of £500 and £400 towards the costs of the prosecution. The individual appellants were convicted on four counts of attempting to buy pears in excess of the maximum permitted price, and were each fined £100 in respect of the counts charging those offences, and were also convicted on one count of failing to keep accurate records of all purchases and sales of fruit and vegetables as required by art. 10 of the Fresh Fruit and Vegetables (Restriction on Dealings) Order, 1945. In respect of the conviction on the count charging that offence they were each fined a further £100. They were also ordered to pay £400 towards the costs of the prosecution jointly and severally with the appellant company.

The company carried on the business of selling imported pears, and it sold the pears covered by the counts in the indictment to one Thompson, of Birmingham, to Richards, Ltd., of Birmingham, to Carter, of Bristol, and to the appellants Dalton and Strong. All the transactions were sales of numbers of boxes of pears described as being of 46 lbs. weight. The company in each case carried through to completion the particular transaction. The company was charged on eight counts with selling, and the individual defendants on five counts with buying, pears in excess of the maximum permitted price, but the jury in each case acquitted all the appellants of the full offence, but convicted on a number of counts of attempting to commit the offence charged, as stated above.

J. D. Casswell, K.C., and Sebag Shaw, for the appellant company.

Victor Durand for the appellants Dalton and Strong.

N. M. G. Faulks and Philip Syrett, for the Crown.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON,
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

The arguments are sufficiently indicated in the judgment.

Cur. adv. vult.

April 8. The following judgment of the Court was delivered :

BIRKETT, J. : The appellants in this case are Percy Dalton (London), Limited and Jack Dalton and Joseph Strong. They were convicted at the Central Criminal Court last October before the learned Commissioner. The company, a firm of fruit dealers, were charged in eight counts of the indictment with selling pears in excess of the Imported Pears Order, 1946. They were acquitted by the jury on all the counts which charged them with selling, but on seven of those counts, although acquitted of selling, they were convicted of attempting to sell pears in excess of the maximum permitted price. They were fined £500 and ordered to pay £400 costs jointly and severally with the two individual appellants, Jack Dalton and Joseph Strong.

The appellant Jack Dalton was employed by the appellant Joseph Strong, Joseph Strong being a licensed wholesaler carrying on his business at Brentford Market. Part of Jack Dalton's duties was to keep the books of account. They were both charged on five counts in the indictment with buying pears in excess of the maximum price permitted by the said Order, and in one count with failing to keep accurate records of all purchases and sales of fruit and vegetables as required by art. 10 of the Fresh Fruit and Vegetables (Restriction on Dealings) Order, 1945. They were acquitted on all the counts which charged them with buying, but were convicted on four of those counts of attempting to buy and were fined £100 each. They were also convicted on the count which charged them with failing to keep accurate records and fined £100 each on that count. They, too, were ordered to pay £400 costs jointly and severally with the appellant company. Against all the convictions the appellants now appeal.

The relevant facts may be quite shortly stated. The company carried on the business of selling imported pears, and it

sold the pears covered by the counts in this indictment to one Thompson, of Birmingham, Richards Limited, of Birmingham, Carter, of Bristol, and to Jack Dalton and Joseph Strong. All the transactions were the sales of numbers of boxes of pears described as being of 46 lbs. weight.

Article 2 (1) (a) of the Imported Pears Order, 1946, reads: "No person shall (a) sell or buy any pears at a price exceeding the maximum price applicable in accordance with the provisions of the Fourth, Fifth, Sixth and Seventh Schedules to this Order". Part 1 of the Sixth Schedule is headed: "Provisions relating to maximum prices on an import sale or a first hand sale". These are the conditions laid down: "The maximum price shall, subject as hereafter provided in this Part of this Schedule, be the appropriate price specified in the table of maximum prices (and transport additions) set out in Part 3 of this Schedule". Clause 4, sub-clauses (1) and (2), provides: "(1) The maximum price includes all costs and charges of and incidental to delivery by the seller at the quay at which the pears were landed in the United Kingdom. (2) Where at the request of the buyer delivery is given by the seller otherwise than at the said quay, the maximum price may be increased by the amount of any costs and charges reasonably paid or incurred by the seller in respect of the transport of the pears from the said quay, to the place at which delivery is given to the buyer". In Part 3 of the Sixth Schedule there are columns dealing with "maximum price on an import sale", "maximum price on a first hand sale", and "maximum addition for transport to the seller's premises on a sale by wholesale". The appropriate figures are given in the rate per cwt.

The appellant company came within the provisions relating to a first hand sale, and what it was entitled, therefore, to charge was the figure in Group 2, Area 1, of Part 3 of this Schedule; that is 82s. 10d. per cwt., plus the amount, if any, permitted by clause 4, sub-clause (2) of Part 1 of the Sixth Schedule; that is to say, costs and charges reasonably paid or incurred in accordance with that provision. In each of the

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON,
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

transactions in the indictment, however, it was not contended that that procedure had been followed. What was done was to charge the rate of 82s. 10d. per cwt. and then to add the figure of 1s. 5¼d. The controlled price for a box of pears weighing 46 lbs. at 82s. 10d. per cwt. was, therefore, 34s. 0¼d., and when the figure of 1s. 5¼d. was added the price was 35s. 5½d. The 1s. 5¼d. was calculated in this way. In column 5 of Part 3 of the Sixth Schedule, a maximum addition for transport to the seller's premises on a sale by wholesale of 3s. 6d. per cwt. was permitted; and 1s. 5¼d. is the proportion of the 3s. 6d. allowed on a sale of 46 lbs. That was, of course, quite a wrong procedure, for the company was in the position not of wholesalers, but first hand salesmen; and though it might have been permitted to add something to the price if the facts brought it within clause 4, sub-clause (2), of Part 1 of the Sixth Schedule, no attempt was made to do any such thing; and the price of 1s. 5¼d. calculated in the way described was added in each case with complete uniformity without regard to the provisions of clause 4, sub-clause (2), at all.

Considerable controversy arose at the trial as to whether this procedure was the result of a misunderstanding of the Order, or whether it was a widespread practice adopted with knowledge of its irregularity; but for reasons which appear it is not necessary to discuss that aspect of the matter further, for an additional complication arose. The Imported Pears Order, 1946, deals only with weight, prescribing the rates per cwt., and no mention is made of sales by boxes or cases. If the boxes of 50 lbs. gross weight, sold as containing 46 lbs. net weight, in fact contained 47 lbs. 15 ozs. net weight, then the 1s. 5¼d. mistakenly added to the charge would be covered, and in fact there would be no excess charge. All the boxes sold which formed the subject of the charges could no longer be weighed and checked; but evidence was called to support the view that the boxes were imported as "46 lbs. or better", and were usually some 2 lbs. or 3 lbs. more than 46 lbs. net weight. These boxes, it was therefore said, may have been

1 lb. 15 ozs. over the 46 lbs. net weight, and the prosecution were not able to prove that they were not.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

The evidence of Mr. Parker of the Weights and Measures Office of the London County Council, and of Mr. Bond, one of the inspectors of the Ministry of Food, was designed to show that, speaking quite generally, similar boxes of pears to those in question were usually more than 46 lbs. net weight, being in some cases as much as 50½ lbs. Again, it is not necessary to examine further the question of transport charges, or the question of net weights, on which a great deal of time was most naturally spent in the Court below, for the reason that the jury acquitted the company on the charges relating to selling in excess of the maximum price. Whatever may be said about the way in which this conclusion was reached, and in some respects it was most unsatisfactory, as the transcript of the evidence shows, it must be accepted in this Court. The company is entitled to say that it has been found Not Guilty on the offences charged against it of selling pears in excess of the permitted maximum price.

Mr. Casswell submitted that the jury's verdict means that the company has not sold pears in contravention of the Imported Pears Order, and, that being so, it cannot on the self same facts be found guilty of attempting to do so. What the company did was to carry through to completion the very transactions it attempted. The jury have found that those transactions did not infringe the provisions of the Order. It must follow in those circumstances that the company cannot have infringed the Order by attempting to do that which, when completed, was no offence. He further submitted that no direction, or at least no proper direction, was given to the jury on what constituted an attempt; and, further, that the case of the company ought to have received separate consideration, and the jury ought to have been so directed.

In Regulation 90 of the Defence (General) Regulations, 1939, there is a provision in subsection (1) which says: "Without prejudice to the operation of section 5 of the Summary Jurisdiction Act, 1848, and section 8 of the Accessories and

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

Abettors Act, 1861, "any person who attempts to commit, conspires with any other person to commit, or does any act preparatory to the commission of, an offence against any of these Regulations, shall be guilty of an offence against that Regulation punishable in like manner as the said offence". In subsection (2A) it is provided: "Any reference in these Regulations, or in any order, rule or byelaw made thereunder, to any particular offence against any of these Regulations shall be construed as including a reference to any offence which by virtue of paragraph (1) or (2) of this Regulation, is punishable in like manner as that particular offence".

There is very little said, but there is an indication in the summing up to the jury that they are to consider the evidence as to the attempt as an offence against the Regulation. The passage which deals with that matter is in these words: "I say that because there is another Regulation which says if anyone attempts to do the thing which is forbidden by the Regulation that attempt shall be an offence".

Mr. Faulks submitted on the authority of CLAYTON, which was a case decided in the Court of Criminal Appeal on February 22, 1943 (see note to this report), that in this case it was really quite immaterial whether the attempt was to be regarded as being an attempt within Regulation 90, or a common law misdemeanour, because *mens rea* was not essential to either offence, and if it were there was evidence of *mens rea* for the jury.

Our attention was also drawn to certain cases to which I need make only a very short reference. The first was BROWN (1890), 24 Q. B. D. 357. That was a case of a person who had pleaded guilty to an indictment "charging him with having attempted to commit unnatural offences with domestic fowls and was sentenced to a term of imprisonment. After the Judge left the assize town his attention was called to an unreported case which was said to have decided that a duck was not an 'animal' within the meaning of the Offences against the Person Act, 1861 (24 & 25 Vict., c. 100) s. 61, and he thereupon stated a case requesting the opinion of the Court

for Crown Cases Reserved whether the conviction was good". It was held that the indictment was good and the prisoner was properly convicted. But Lord Coleridge, Chief Justice, in giving judgment in that case said (at p. 358), "In COLLINS (1864) L. & C. 471, the Court held that, where a man put his hand into another's pocket and there was nothing in the pocket which he could steal, he could not be convicted of an attempt to steal. That is a decision with which we are not satisfied. DODD (1877) unrep., proceeded upon the same view, that a person could not be convicted of an attempt to commit an offence which he could not actually commit. Some of the Judges, I know, yielded with great reluctance to the authority of COLLINS (*supra*), and thought that decision was wrong. In this case it would seem on the question of fact that the ground of the decision in DODD (*supra*) fails, because I should suppose it is obvious that as a fact the offence could be committed by the boy". That case, in our view, is not very helpful, if at all, upon the matter with which the Court is concerned.

Then there was the case of WILLIAMS, [1893] 1 Q. B. 320. The headnote of that case is: "Although a boy under 14, who is tried on an indictment under section 4 of the Criminal Amendment Act, 1885, charging him with having had carnal knowledge of a girl under 13, is entitled to be acquitted of that offence, he may be convicted of an indecent assault under section 9 of the Act". That is the purport of the case. It was cited before us because of the difference of opinion which was expressed by the Judges in this way. Lord Coleridge said (at p. 321) the boy was proved at the trial "to be under the age of 14 and, therefore, could not by law be convicted of rape: nor could he, in my opinion, be convicted of attempting to do that which the law says he was physically incapable of doing". Hawkins, J., said: "I do not assent to the notion that the boy cannot be convicted of an attempt to do that which the law says he cannot do". Cave, J., said (at p. 322) that he would desire a further discussion on the question before deciding it, but at present he was inclined to agree with the opinion of Hawkins, J. Day, J., (at p. 323)

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

agreed with Cave, J., and Collins, J., said that he was of the same opinion. But whatever be the proper answer to that matter, again that case has very little to do with the facts which we have to decide. A further case was cited, *BROWN & OTHERS*, (1899), 63 J. P. 790, which was a case of a woman taking some material believing it to be noxious though it was in fact innocent, and the charge against her was that she attempted with intent, and it was held there that the conviction was good.

I mention these cases because they were cited before us in argument, but in our view none of them touch the main point in the present case, and none of those decisions is in conflict with the decision to which we have come. We confine ourselves to the facts of this case, which are that the appellant company has been acquitted by the jury of the offences charged in the indictment of selling pears above the maximum price permitted by the Order. All the acts of the company have been considered by the jury in coming to that conclusion; and we feel it impossible to say on the same facts that the company can be convicted of the attempt to sell above the maximum price when the completed transaction was no offence. Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.

In *LAITWOOD* (1910), 4 Cr. App. R. 248, Pickford, J., after citing with approval the definition in the Draft Code, said, "An act done or omitted with intent to commit that offence forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause", went on to say in giving judgment: "But adopting the definition suggested of an attempt which is practically the same as that given in *Stephen's Digest*, there was here an

act done in order to commit an offence which formed part of a series which would have constituted an offence if not interrupted; therefore we think there was here an attempt, and the conviction ought to stand”.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

With regard to Jack Dalton and Joseph Strong, they were acquitted by the jury on the charges of buying pears in excess of the maximum price permitted by the Order, but were convicted of an attempt to buy in excess of that price. Mr. Durand complains on their behalf that the jury were not told to give separate consideration to their cases, and that there was no direction to the jury, or no proper direction, on the question of what constituted an attempt. The passages in the summing up which really deal with that question of definition are these. “If in fact they tried it—to use an ordinary expression ‘to try it on’—hoping that people would not worry if everyone was doing it and everyone knew a first sale could carry with it a proper expense for transport, then you have got a result which makes it proper that you should consider this from the point of view, if you are not satisfied that there is any real proof, satisfied as reasonable people that there was any sale over the maximum price in any of these counts, are you satisfied there was an attempt?” Then he made reference to the Regulation which I have already quoted, and continued: “If I am wrong, I shall be corrected somewhere else. I have directed you that you could, although there was, you may think, this real difficulty of proving this sale over the maximum price (because you cannot guess anything and on a guess convict a man) consider the attempt; whether or not it is said: ‘We were doing it; so was everyone else, and that is why these sales took place’. Mr. Rutland came and said he knew all about it”. Then the learned Commissioner continued: “If it was ever arranged or discussed by these people with the result that this 35s. 5½d. was being charged—whether it was an attempt to evade the Regulations and which, for the reason that everybody was doing it, did not seem very important and might not be questioned”. A little later on he says: “That is why I say to you you can, if you think right, ignore for lack

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

of proof that there was in fact a sale over the maximum price. If so, it is possible for a man to be charged with an attempt to do so". Then, finally, when the jury came back and said: "There has been a bit of controversy as to the weight of the boxes of pears. I think the jury would like to know whether they are imported and sold as 46 lbs.", the learned Commissioner said: "I think that was the idea according to the documents, but it may be—and I said so when I was summing up this case to you—that there may be a doubt in some particular cases that some or all of these boxes in fact contained 46 lbs. In that case—and that is why I thought it right to put the matter in the way I did—if that is all that is troubling you, it would be open to you to find a verdict of Not Guilty on the particular count, but Guilty of an attempt to sell above the maximum price on the one hand, and to buy at the maximum price on the other hand", to which the foreman of the jury said: "I think we are all agreed upon that".

As I have said, we do not discuss the adequacy of that direction for the reasons I have already given. But it is difficult to see in the case of Jack Dalton and Joseph Strong what evidence there was of any attempt on the part of these two appellants. They either bought in excess of the maximum price or they did not, and the jury have found that they did not. How it can be said in those circumstances that they attempted to buy it is difficult to see, and we feel it impossible to support the conviction for attempting to buy pears in excess of the maximum price permitted by the Order.

With regard to count 14, which charged them with failing to keep the accurate records prescribed by the other Order, there was evidence before the jury relating to both appellants. Their business relationships were dealt with in some detail; the evidence as to the state of the records was plainly before the jury; and on this count the jury were properly directed.

In the result the appeal of the company is allowed and the convictions quashed. The appeal of Jack Dalton and Joseph Strong is allowed in respect of the counts on which they were convicted of attempting to buy, and those convictions are

quashed; but the appeal in respect of the count on which they were convicted of failing to keep accurate records is dismissed and the conviction affirmed, and the fine of £100 on each of the appellants is confirmed. The Order of the learned Commissioner for the payment of the sum of £400 costs against all the appellants is set aside.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON,
JOSEPH
STRONG.

Appeal of one appellant allowed.

Appeal of other appellants allowed in part.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

Solicitors: Judge, Hackman & Judge, for the appellants;
Treasury Solicitor, for the Crown.

Appended below is the material portion of the judgment in CLAYTON, decided on February 22, 1948, by a Court consisting of the Lord Chief Justice (Viscount Caldecote), Mr. Justice Asquith and Mr. Justice Oliver.

ASQUITH, J.—This is an appeal by one of four men who were indicted at the Central Criminal Court for conspiracy. One of them called Flatman was acquitted; the second called Passmore pleaded guilty, and the other two, of whom the appellant was one, were convicted. The appellant appeals against his conviction, though not against his sentence.

The indictment, about which I shall have to say a word or two later, in the statement of offence charges these men with conspiracy contrary to Regulations 55 and 90 of the Defence (General) Regulations, 1939, and in the particulars of offence it is said that the four men between March 1, 1940, and May 1, 1941, conspired together and with other persons to contravene the provisions of the Limitation of Supplies (Miscellaneous) Order, 1940, No. 874, and the Limitation of Supplies (Miscellaneous) (No. 5) Order, No. 2031.

Now before considering the grounds of this appeal, it is necessary briefly to review, first of all, the various regulations

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

and orders involved, and, secondly, to review shortly the facts. So far as the Regulations are concerned, the first one which is mentioned in the indictment is Regulation 90, and that Regulation reads as follows: "Without prejudice to the operation of section 5 of the Summary Jurisdiction Act, 1848, and section 8 of the Accessories and Abettors Act, 1861, any person who attempts to commit, conspires with any other person to commit, or does any act preparatory to the commission of, an offence against any of these Regulations, shall be guilty of an offence against that Regulation punishable in like manner as the said offence". Now among the other Regulations referred to in Regulation 90 is Regulation 55, which I will not cite. It is merely necessary to say that it gives sweeping powers to regulate and control industry; but what it is necessary to say is that under that Regulation the two Orders named in the indictment were made, the Limitation of Supplies (Miscellaneous) Order No. 874, and the subsequent Limitation of Supplies (Miscellaneous) Order No. 2031. The first of those Orders provides in its first article in effect that all wholesalers and manufacturers of articles which are controlled goods must register with the Board of Trade. The most material provision for the purpose of this appeal is article 2, which provides: "Except under the authority of a licence granted by the Board of Trade and in accordance with any conditions attaching thereto, no person, who at any time during the period beginning with the 6th day of June, 1940, and ending with the 30th day of November, 1940, is a registered person in relation to any class of controlled goods, shall supply during that period a total quantity of that class of controlled goods exceeding in value two-thirds of the value of the total quantity of that class of controlled goods supplied by him during the period beginning with the 1st day of June, 1939, and ending with the 30th day of November, 1939". Then there follows a proviso which is not relevant to this case.

What the Order is providing, in simpler language, is this. It takes as the standard period the period from the 1st June to the 30th November, 1939, and the later period, to which

the restrictions imposed by the Order apply, is called the trading period. It says that in the trading period if you are a registered person with regard to controlled articles, you may only supply two-thirds of the controlled articles which you supplied during the standard period. It follows, of course, that if you supplied no controlled articles during the standard period, you are not entitled to supply any during the restricted period. The second of these two Limitations of Supplies Orders only differs from the first in two respects. Article 6 reproduces article 2 of the earlier Order, but instead of imposing a flat quota of two-thirds, it imposes different percentages in regard to different classes of controlled goods, and those are set out in the Order. The other difference is that it provides for the first time by article 8 (2), that anyone possessing an unexhausted quota is entitled to sell it to anyone else. The actual words are: "A registered person in respect of any class of controlled goods who is at any time entitled under the provisions of article 6 (otherwise than by a licence) to supply any quantity of controlled goods of that class during the remainder of the period of restriction may, by a note or memorandum in writing signed by him, transfer that right in respect of the whole of that quantity to another such registered person", and then it goes on to provide that if he does so, he has got to get the consent of the Board of Trade in writing and lodge a copy of the note or memorandum within seven days of the transfer.

Between the first and the second Order, owing to air bombing attacks on this country, a number of persons having quotas found their premises or their stocks destroyed and were left with quotas and no business or premises from which to sell them, and they were permitted, subject to the conditions set out in that Order, to sell their quotas, so far as they had not used them, to other persons. Now those are, I think, the only statutory provisions, Regulations or Orders which I need cite.

Coming to the facts in this case, early in 1940 a man called Flatman registered under the Business Names Registration

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finemore,
J.

Act a concern called the Dorchester Trust. Flatman was in fact the nominee of the appellant Clayton and was a cypher. Clayton was given a complete power of attorney to carry on the affairs of the Trust, and in fact most of the letters of the Trust, if not all of them, were signed by him. Flatman was associated with the concern to this extent, that he paid its rent and acted as intermediary or, it is suggested by the defence, as a mere messenger between Clayton and the third defendant Passmore. A man called Mather, who was employed by the Trust at a salary, in late October applied on behalf of the Trust to the Board of Trade for registration of the Trust as dealers in controlled goods. At this time the first of the Limitation of Supplies Orders was in force. In this letter he quite frankly told the Board of Trade that the Trust had had no previous dealings in controlled goods, and, therefore, by implication no such dealings in the standard period. The Board of Trade nevertheless registered the Trust and announced their decision by the letter of the 23rd October, which is Exhibit 6, but in the same letter they ask for a return of controlled goods supplied by the Trust in respect of the standard period, that is from June to the end of November, 1939. That letter was replied to on behalf of the Trust by an accountant called Prager, and Prager pointed out to the Board of Trade that it was impossible for the Trust to render the return asked for since it was not in existence at the period in question.

Now up to this point everything is apparently candid and above board, but of course the fact was at that time that the Trust had not got and was not entitled to a quota, yet this letter, which I have just referred to, of Prager's speaks of the quota allotted to the Trust. On December 9, 1940, the Board of Trade corrected this fallacy, and from page 146 of the transcript it appears that this letter was shown to Clayton. The letter said: "Your clients have no quota for sales to unregistered persons in the period 6th June to the 30th November, 1940", that is the trading period covered by the first Order. The letter then goes on: "I am to express regret

that the Board cannot grant to your clients a licence permitting such sales to unregistered persons ”.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

Now this letter, one would suppose, was perfectly clear in its terms. It was followed by another, which is even clearer, to which I do not attach any importance, because it did not come to the notice of any of the parties at the material time. In fact, the Trust, that is Clayton, had no quota, no right to supply controlled goods to unregistered persons, and no right to sell quota at this or at any material subsequent time. Nevertheless the Trust, that is Clayton, went ahead and proceeded to behave exactly as though they had a quota, and not only as though they had a quota, but as though they had quotas of a specified amount. It supplied, in the sense in which we understand that term, or it procured the supply of, controlled goods to unregistered persons by representing that it had a quota, which in fact did not exist, and it enabled unregistered persons to be so supplied. These transactions, which ran into something like £100,000 worth of goods or quotas took different forms. There has been a good deal of dispute as to the precise form which they did take, but the result which it must be taken to have contemplated and intended was always the same; that is, to procure or promote the supply of controlled goods to persons who had no right to receive them.

Now the Crown allege that all this was done in pursuance of a conspiracy to which Clayton was a party, and the jury convicted him on this charge. I am not sure whether it is contended that there was no evidence on which a jury could reasonably find that the appellant agreed with anyone to do anything in contravention of the Orders. Such a contention would, we feel, necessarily fail. Serjeant Sullivan admitted in the Court below that between the appellant and the defendant Passmore, at any rate, there was an agreement of some kind, an agreement under which, at the request of the appellant, Passmore was to supply certificates, and Passmore did in fact supply certificates—he pleaded guilty in this case—which he signed vouching for the Trust’s possession of a quota, and even

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.

JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

giving specific figures for the amount of that quota, often different specific figures for different types of controlled articles, and these certificates were used to facilitate the transactions to which I have referred.

Now with regard to the grounds of appeal, the first and for a long time the only ground put forward was this. It was conceded that a person who sells controlled goods to unregistered persons in excess of his quota, and *a fortiori* if he has not any quota, commits a breach of the Orders whether or not he knows that his action amounts to such a breach, and no particular state of mind or intent on his part is a necessary ingredient in the offence, which is complete if, without more, he does what the Orders forbid. While it is admitted that that applies in the case of an individual, we are invited to say that entirely different considerations apply when persons are charged with conspiracy, that is, with an agreement to do the act which is forbidden by the Order. It was contended that in order to establish this charge, the accused must be shown not only to have agreed to the act, but to have known it was forbidden by the statutory provisions, and that *mens rea* in that sense is required. Now that is a proposition for which no direct authority has been cited and is one which we entirely reject. The defence was that Clayton and Passmore had been advised by a solicitor called Frost and I think a man called Shalet that what they were doing was not wrong, and that, once they got registered, that registration automatically carried with it a right to a quota, a quota of unspecified dimensions, until the Board of Trade chose to impose some other conditions. It is said that they acted in perfect good faith. If we accepted the proposition that *mens rea* is a necessary ingredient in conspiracy, we should still think that there was abundant evidence on which the jury could find that *mens rea* was present. We have to consider the Board of Trade's letter of the 9th December, which Clayton saw, which informed him that the Trust had no quota. We feel the gravest doubts, as to transactions which took place after that date, at all events, that he could possibly have been ignorant

of the fact that he was breaking the Orders. We can find no support for the proposition that *mens rea* in this sense is needed in the case of conspiracy. We demur to the notion that there is anything particularly wicked attached to the word "conspiracy". No doubt in common speech "conspiracy" has a melodramatic and sinister implication, but it has been pointed out that it carries no such implications in law. The definition of it is simply an agreement to do an unlawful act—an act prohibited by statutory provisions—or a lawful act by unlawful means. It does not matter how prosaic the unlawful act may be or how ignorant the conspirators may be of the fact that the act is prohibited by the statutory provision.

Now that is the first and the main point taken on this appeal, but additional grounds of appeal, which for some reason did not reach the office at the proper time, have been submitted since the hearing of this case began. The first ground is that of misdirection under heads (a), (b), (c) and (d). Head (a) of misdirection is this: "That the learned Judge misdirected the jury in his ruling that the regulations set forth in the indictment created a new offence of conspiracy". Now we do not think that Regulation 90 did create a new offence of conspiracy. In our view, it simply provides that a common law conspiracy to break the Regulation need not always be the subject of an indictment but can be proceeded against summarily as though it was an offence against the Regulation and can be summarily punished. We think that is all it means. It is essentially a machinery Regulation. It is quite true that the learned Judge said that the conspiracy here charged rested on the wording of Regulation 90—I am quoting from the first page of his summing-up. Let us assume not only what is clear but also that he meant that the regulation created a new offence and he was wrong in so thinking. That would be a technical misdirection, but the misdirection is, in our view, wholly immaterial unless the supposed new offence differed in some way from ordinary common law conspiracy. But the ingredients of the offence as explained by the learned Judge to the jury could differ in no way from those of the common

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON,
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

1949.
April, 6, 7, 8.

PERCY
DALTON
(LONDON),
LTD.
JACK DALTON.
JOSEPH
STRONG.

Hilbery, J.,
Birkett, J.,
Finnemore,
J.

law conspiracy, either as to the necessity for *mens rea* or otherwise, and the result is the same as if he had directed them that they were concerned with a common law conspiracy and nothing else. As a matter of fact, Serjeant Sullivan has said to us that he is quite willing that the case which was argued upon that footing below should be argued upon that footing here. One consequence is that the indictment is formally inaccurate in so far as it says conspiracy contrary to Regulation 55 and Regulation 90. The application having been made below, the words "contrary to Regulation 90" were rejected as surplusage and they can be ignored here.

[His Lordship then dealt with the other grounds of appeal, and stated that in the opinion of the Court there was no substance in any of them, and that the appeal must be dismissed.]

CIRCUIT CASE

(NORTH-EASTERN CIRCUIT—LEEDS SPRING ASSIZES)

BEFORE

MR. JUSTICE STREATFEILD.

ABDUL RAHMAN.

1948.
May 7.

*Marriage—Solemnisation—Non-registered Building—Private House
—Islamic Ceremony—Marriage Invalid by English Law—
Indictment—Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 39.*

By section 39 of the Marriage Act, 1836: "Every person who . . . shall knowingly and wilfully solemnise any marriage in England, except by special licence, in any other place than a church or chapel, in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice [of marriage] and [registrar's] certificate . . . shall be guilty of felony."

A Mohammedan purported to perform a ceremony of marriage in a private house in England, which was not registered for the solemnisation of marriages, between a Mohammedan man, who was already married to a woman in India, and an English woman. The ceremony purported to be conducted in accordance with the Islamic faith. No special licence had been obtained. The defendant was indicted for an offence against section 39 of the Act of 1836, the particulars of offence alleging that he "knowingly and wilfully did solemnise a marriage between M.H.M. and M.J.B. without a special licence in a place other than a church or chapel in which marriages may be solemnised according to the rites of the Church of England or than a registered building or office in which a marriage may validly be solemnised, namely, [a private house]".

Held, (i) that, although the indictment did not precisely follow the wording of the section, it defined the offence with which the defendant was charged with sufficient precision, and was, accordingly, good; (ii) that, although the marriage would have been invalid under English law, one party being already married, the ceremony nevertheless amounted to the solemnisation of a marriage for the purpose of section 39 of the Act of 1836.

Dictum of Barnard, J., in SRINI VASAN (otherwise CLAYTON) *v.* SRINI VASAN, [1946] P. 67, applied.

1948.
May 7.

Trial by Streatfeild, J., at Leeds Spring Assizes on May 7, 1948.

ABDUL
RAHMAN,
—
Streatfeild,
J.

The defendant was charged with an offence under s. 39 of the Marriage Act, 1836, the particulars of offence alleging that on December 12, 1947, he "knowingly and wilfully did solemnise a marriage between Mohammed Hassan Mia and Mary Jane Brown without a special licence in a place other than a church or chapel in which marriages may be solemnised according to the rites of the Church of England or than a registered building or office in which a marriage may validly be solemnised, namely, [a private house]". The ceremony was performed by a Mohammedan in accordance with the rites of the Islamic faith in a private house in England, which was not registered for the solemnisation of marriages, nor had any special licence been obtained. By English law the marriage would have been invalid, as Mohammed Hassan Mia was already married to a woman in India. Before the defendant had pleaded his counsel sought to quash the indictment on the ground that it did not follow the words of the section on which the charge was based, but this contention was overruled.

Hurwitz, Sheikh Abdul Gafur and J. T. Williams for the defendant.

Clough for the Crown.

STREATFEILD, J. : I consider that the indictment is drawn in such a way that, even although it does not follow the *ipsissima verba* of s. 39 of the Act, it sufficiently defines what the alleged offence is, and in those circumstances I think the indictment is good.

On the trial proceeding it was contended for the defence that the ceremony was not a solemnisation of marriage within the meaning of the Act of 1836.

STREATFEILD, J. : I have to rule as a matter of law whether there is a case for the defendant to answer under s. 39 of the Marriage Act, 1836, for which purpose it is necessary for me

1948.
May 7.

ABDUL
RAHMAN.
—
Streatfeild,
J.

to construe the meaning of the word "marriage", particularly in the context "solemnise any marriage in England". It has been submitted to me that, this being a penal Act, one may not read into the statute any words which are not there, and with that submission I agree. The word "marriage", however, is not defined, and it seems, therefore, that I have to construe the word in relation to the objects of this penal Act. It has been submitted that this was not a marriage or a solemnisation of a marriage because it was a marriage between a Mohammedan and an English woman who had been converted to Islam, by Mohammedan law limited polygamy is recognised, and that cuts at the root of the English conception of the word "marriage" which is said to be the union of one man and one woman and no other. In construing the word "marriage" in this sense I must be influenced by corresponding words in the Offences against the Person Act, 1861, whatever may be the construction of the word when used in Acts concerning matrimonial causes, and on looking at s. 57 of the Act of 1861, which creates the offence of bigamy, one sees the word "marriage" used as meaning two different things. The words in s. 57 are: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony . . ."

Clearly the words "being married" mean "being lawfully married" and the words "shall marry" and "second marriage" refer to a marriage which is not only unlawful and void, but which in itself gives rise to a criminal offence, and therefore must mean a purported marriage or a form of marriage. It matters not whether the bigamous marriage takes place in a registry office or whether it takes place in a church or a synagogue or other place of worship. It seems clear, therefore, that in that penal Act the word "marriage" means a purported marriage, and, although that Act is of later date than the one which I am construing, that is of assistance in determining the meaning of the words "solemnise any marriage in England" in the Act of 1836.

1948.
May 7.

ABDUL
RAHMAN,
—
Streatfeild,
J.

Reference has been made to the extent to which the law has recognised Hindu marriages, and certainly it appears that in 1866 Lord Penzance laid down that because of its intrinsically polygamous nature a Hindu marriage could not be recognised in this country. Later decisions, however, appear to have put a different interpretation on a Hindu marriage than were there stated. In 1946 Barnard, J., in giving judgment in *SRINI VASAN* (otherwise *CLAYTON*) *v.* *SRINI VASAN*, [1946] P. 67, after reciting Lord Penzance's decision in *HYDE v. HYDE AND WOODMANSEE* (1866), 1 L. R. P. & D. 130, and quoting from the speech of Lord Maugham in the *SINHA (PEERAGE) CASE* (1939), 171 Lords' Journals 350, came to the conclusion that the textbook view that the only kind of marriage which English law recognises is a monogamous one was wrong. He continued: " . . . and, relying as I do on the above passages from Lord Maugham's speech, I ought, therefore, to recognise this Hindu marriage as a valid marriage. . . . To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based ".

With those words I respectfully agree. In these days it would be intolerable if we in this country were to refuse to recognise the validity of a Hindu marriage because polygamy is recognised under that faith and not under the faith of the Established Church of England. It is noticeable that in that case there was a Hindu marriage which was celebrated or performed in England, although it is true it was performed at a registry office and in compliance with the requirements of the Marriage Act, 1836.

Counsel for the Crown relies also on the words of Viscount Dunedin delivering the judgment of the Privy Council in *BERTHIAUME v. DASTOUS*, [1930] A. C. 79, at p. 83, where he states: " If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or

other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage".

1948.
May 7.
—
ABDUL
RAHMAN.
—
Streatfeild,
J.

There is, therefore, nothing to support the view that merely because this was a Mohammedan marriage—or purported to be a Mohammedan marriage—it is not recognisable in this country on the ground that polygamy is permitted in India, and, indeed, this bridegroom was married to a woman in India already. It does not prevent this from being the solemnisation of a marriage, even although it should turn out that by the law of this country, he already being married, it was an invalid marriage. It was, in my opinion, none the less the solemnisation of a marriage and I construe the word "marriage" in s. 39 of the Act of 1836 as having the same meaning as it does in the Offences against the Person Act, 1861, s. 57.

Verdict : Guilty.

*Solicitors : Saffman, Fielding & Co., Leeds, for the defendant ;
O. A. Radley, Town Clerk, Leeds, for the Crown.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

1949.
March 2.

LORNA NORRIS.

*Young Person—Conviction by Court of Summary Jurisdiction—
Committal to Quarter Sessions for Sentence—Borstal Training
—Powers of Court of Criminal Appeal—No Power to Quash
Conviction—Power to Quash or Vary Sentence—Criminal
Justice Act, 1948 (11 & 12 Geo. 6, c. 58), s. 20 (3).*

Where a young person has been convicted by a Court of summary jurisdiction and committed to quarter sessions for sentence under s. 20 (3) of the Criminal Justice Act, 1948, and quarter sessions has passed a sentence of Borstal training, the Court of Criminal Appeal has no power to quash the conviction, but may quash or vary the sentence.

Appeal against sentence.

The appellant, a young woman under 21 years of age, was convicted at a Court of summary jurisdiction at Ellesmere Port of larceny of clothing from her mother, and the justices considering that a sentence of Borstal detention [now Borstal training] would be appropriate, committed her to Cheshire Quarter Sessions for sentence under s. 20 (3) of the Criminal Justice Act, 1948. On January 4, 1949, the appeal committee of quarter sessions passed a sentence of three years' Borstal detention.

C. D. T. Cassidy, for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: Assuming that the appellant was properly convicted, the sentence which was passed on her by the appeal committee of quarter sessions was clearly a proper one.

It now appears that the appellant's mother, whose clothing was supposed to have been stolen, has sent a letter to the Secretary of State, who has forwarded it to this Court. The Court has given careful consideration to the letter, which has all the appearance and ring of truth about it. If what the mother states in the letter is true, it appears to this Court that the appellant should never have been convicted. The mother stated that the clothing was hers; that she gave it to the appellant and told her she could have it; that she never prosecuted the appellant and told the superintendent of police that she did not want to prosecute her; and that at the time when she heard that the appellant was being prosecuted she was too ill to go to the Court herself, but she wrote a letter to the justices and asked her husband to give it to them. That letter, apparently, was never delivered to the justices.

The difficulty in which this Court finds itself is that we have no power to inquire into a conviction of this nature because the appellant was not convicted on indictment. She was convicted by justices and committed to quarter sessions under s. 20 (3) of the Criminal Justice Act, 1948, as a person on whom a sentence of Borstal detention would be appropriate. The only method of appeal where a person is convicted before justices is by appeal to quarter sessions. This Court has no jurisdiction to quash the conviction, but the case is so unsatisfactory that we have come to the conclusion that we should release the appellant, which we can do, because in such a case we can always interfere with the sentence. We have accordingly decided that the right course to take is to quash the sentence of Borstal detention and substitute for it such a sentence of imprisonment as will enable the appellant to be discharged to-morrow morning, so that she may be taken back by the prison authorities to Manchester to-day and discharged from there to her home to-morrow morning.

The Court will communicate with the Secretary of State on the matter, because, if the appellant has not been properly convicted, it is obviously right that the conviction should be removed. If the Secretary of State is satisfied by inquiries

1949.
March 2.

LOENA
NORRIS.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

1949.
March 2.

LORNA
NORRIS.

Goddard,
L.C.J.,
Humphreys,
J.,
Birkett, J.

which it is open to him to make, he can take the necessary step of recommending His Majesty to grant a pardon to the appellant, or such other step as he may think right. While we are making no reflection on the justices, the circumstances are such as manifestly to demand further inquiry in view of the mother's statement.

Sentence varied.

The appellant subsequently received a pardon.

CIRCUIT CASE

[NORTH-EASTERN CIRCUIT—LEEDS WINTER ASSIZES]

BEFORE

MR. JUSTICE STREATFEILD.

1949.
March 7, 8.

WILLIAM DOLMAN.

Bigamy—Defence—Belief that First Marriage was Void because Spouse Already Married—Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.

On a charge of bigamy it is a good defence if the accused person can prove that at the time of the second marriage he had reasonable cause to believe, and honestly believed, that his first marriage was void on the ground that at the time of it his spouse was already married.

Trial before Streatfeild, J., at Leeds Assizes.

The defendant, William Dolman, was charged with bigamy, the particulars of offence alleging that on July 1, 1948, he unlawfully married Grethe Jensen during the life of his wife Florence Dolman.

The defendant married his first wife (née Fitzgerald) at Maymyo, Burma, on April 23, 1940. The evidence for the defence was that in 1945, when the defendant was serving in the Middle East and was living away from his wife, following

on certain rumours which he had heard, he wrote to his wife and told her that he did not intend to return to her because he had heard that she was already married at the time when she married him. He received no reply to that letter, but on meeting her in Karachi in 1946, he asked her if it was true that, prior to 1940, she had married one Pte. Gray of the Royal East Kent Regiment, and that she then admitted it and produced what appeared to be a genuine marriage certificate showing that she had married Gray in Rangoon in 1928; and that later she showed him a photograph of the wedding group following on that marriage. The defendant further said that in 1947 he had consulted the Army Legal Aid Group in Cyprus and had been informed by the Chief Chaplain that it had been ascertained that a Pte. Gray of the Royal East Kent Regiment existed and had married a Miss Fitzgerald. The defendant made a statement to the police in which he referred to these matters. Mrs. Dolman was called as a witness for the prosecution, and denied that she had previously married Gray, or had ever told the defendant that she had done so, or had ever shown him the alleged marriage certificate or photograph. Other witnesses were called by the Crown tending to disprove the existence of Pte. Gray and the alleged photograph of the wedding group.

1949.
March 7, 8.

WILLIAM
DOLMAN.

Streatfeild,
J.

G. H. Hartley, for the Crown.

Russell Gurney, for the prisoner.

STREATFEILD, J., in the course of his summing-up, directed the jury: The crime of bigamy is the creation of statute, the Offences against the Person Act, 1861. By s. 57 of that Act an offence is committed by any person who, being married, shall marry any other person during the lifetime of the former husband or wife. If the prosecution prove that the party accused was married to one person and then went through a form of marriage with another person, that constitutes the crime of bigamy, but it has been held that bigamy, like many other offences, requires that there shall be what is known as

1949.
March 7, 8.

WILLIAM
DOLMAN.

Stratfield,
J.

guilty knowledge. There must be an appreciation that a crime is being committed. In many cases the law requires that in addition to an unlawful act there shall be a specific intention to do something or other. That does not apply here, but the person accused must have a culpable guilty knowledge that he is doing something unlawful. Accordingly, it has been held for many years that, even although there is a subsisting marriage, it is open to an accused person to defend himself on a charge of bigamy by showing that he had reasonable cause to believe, and did believe, that his real wife was dead. If he believed that she was dead, although she was not in fact dead, it would follow that when he afterwards went through a form of marriage, he believed that he was entering into a lawful marriage with the second woman and, therefore, there would not be that guilty knowledge and appreciation of wrong-doing which is necessary to constitute this offence. Therefore, although the statute itself does not say that a man shall not "knowingly" or "unlawfully" go through a form of marriage, it has for many years been held that a man does not commit the criminal offence of bigamy unless he realises that he is committing the crime. Therefore, it is open to a man to say, "I had reasonable cause to believe, and I did believe, that my wife was dead".

What is suggested here is that just as it would afford a defence to the prisoner if he could prove that he had reasonable cause to believe that his first wife was dead, so it is a defence if he can satisfy the jury that he had reasonable cause to believe, and did believe, that what he thought at the time to be a legal and subsisting first marriage had turned out to be a void marriage (although in fact it was not), and he was therefore free to enter into the marriage which is alleged to be bigamous. It would, of course, be a defence if he could show that his first marriage was in fact null and void—for instance, on the ground that his wife was already married—for then he would not be a person who, when already married, had gone through a form of marriage with another person. It is suggested, not that it is proved that Mrs. Dolman was in fact

married before, but that the prisoner had reasonable cause to believe, and did honestly believe, that she had been married to a man called Gray before he married her, and he therefore believed that his marriage to her was void. If you think that that is proved to your satisfaction, it has been held before [in *WEIWOW* (unrep.), 1945, Notts Summer Assizes, *per* Macnaghten, J.] that that affords him a good defence, and I so direct you now.

1949.
March 7, 8.
—
WILLIAM
DOLMAN.
—
Streatfeild,
J.

The question which you have to answer is whether, when the prisoner went through the form of marriage with Miss Jensen, he honestly believed on reasonable grounds that his first marriage to Mrs. Dolman was void because she was already married to Pte. Gray. If you think that he did believe that on reasonable grounds, then you will find him not guilty. If, on the other hand, you do not think that he had any reasonable grounds to believe, and did not believe, that his first marriage was void, the offence of bigamy will be made out.

Verdict: Guilty.

Solicitors: V. Douglas Knox, Doncaster, for the Crown;
R. Stanley Pennington, Doncaster, for the prisoner.

BEFORE

MR. JUSTICE OLIVER, MR. JUSTICE BYRNE AND
MR. JUSTICE SELLERS.

CARL LEITZ.

1949.
April 26

*Emergency Legislation—Breach of Control—Minimum Fine—
Special Circumstances—Circumstance Peculiar to Offence as
Distinguished from Offender—Defence (General) Regulations,
1939 (S. R. & O., 1939, No. 927), reg. 55 (1) (d).*

Under reg. 55 (1) (d) of the Defence (General) Regulations, 1939, a person guilty of an offence against the regulation is liable to a minimum fine, unless the Court, having regard to any special circumstances, thinks that there is good reason for not imposing a fine, or for imposing a fine of less amount than the minimum fine.

The meaning to be given to the phrase “special circumstances” is the same as in cases under the Road Traffic Acts. A special circumstance is one special to the facts which constitute the offence in the particular case. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, but directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a special circumstance.

WHITTALL v. KIRBY, [1947] K. B. 194, applied.

Appeal against conviction and sentence.

The appellant, after originally pleading Not Guilty, withdrew his plea and was convicted at the County of London Sessions on February 1, 1949, of an infringement of the Consumer Rationing Order, 1947, and was sentenced by the Deputy Chairman to a fine of £150.

The appellant, together with others and a company called Ascania United Import and Export Corporation Ltd., were charged with an infringement of the Consumer Rationing Order, 1947, in that they supplied 10,000 yards of parachute silk to persons trading as Atlas Trading Supplies without the surrender of coupons. The appellant was informed by the purchaser

that the silk in question would be exported from England, and had that been the case, no offence would have been committed. The appellant acted in good faith and was completely misled by the purchaser.

1949.
April 26.

CARL LEITZ.

Oliver, J.,
Byrne, J.,
Sellers, J.

Christmas Humphreys, for the appellant:

The appeal against conviction cannot be proceeded with, as there was no question of *mens rea* being involved, the appellant being under an absolute duty not to infringe the Order. It is submitted, however, that the penalty was excessive, and that this is a case where the Court can say that there are special circumstances within the meaning of reg. 55 (1) (d) of the Defence (General) Regulations, 1939, inasmuch as the appellant acted in perfect good faith throughout and was wholly misled by the information supplied to him by the purchaser into committing the offence.

Neville Faulks, for the Crown:

It is conceded that the appellant never had any intention of committing a criminal offence, and committed one solely to his having been misled by the purchaser. No question of *mens rea* was involved, and the propriety of the conviction cannot be disputed, but the matters urged on behalf of the appellant are certainly relevant on the question of penalty.

BYRNE, J.: In this case the appellant was convicted upon four counts in an indictment at the County of London Sessions. He with others and a company called Ascania United Import and Export Corporation Limited were charged with an infringement of the Consumer Rationing Order, 1947, in that they supplied 10,000 yards of parachute silk to persons trading as Atlas Trading Supplies without the surrender of coupons. After the trial had proceeded a short time, the appellant withdrew his plea of Not Guilty and pleaded Guilty. He now appeals against sentence. The notice of appeal states that he appeals against conviction also, but Mr. Christmas Humphreys has said that in his view the Consumer Rationing Order under which the appellant was charged threw upon him an absolute

1949.
April 26.

CARL LEITZ.

Oliver, J.,
Byrne, J.,
Sellers, J.

duty, that there was no question of *mens rea* involved, and that in those circumstances the conviction was irresistible.

The facts, which can be stated quite shortly, are these: the parachute silk in question, amounting to 10,000 yards, was sold by the company of which the appellant was managing director, to the other trading concern, Atlas Trading Supplies, without the surrender of coupons, in these circumstances. The appellant was informed by those who were making the purchase that the silk in question would be exported from this country, and if that had been the case, then no offence would have been committed under the Consumer Rationing Order. He was completely misled by the purchaser; he acted in good faith without any intention of committing an offence against this Order, and thus he came before the Court originally, and he comes before this Court today as a person who, in the words of learned counsel for the Crown, never had any intention of committing a criminal offence, but who in fact has committed one, *mens rea* not being necessary, owing to being misled by the purchaser to whom the silk was sold. The Defence (General) Regulations, 1939, provide by Regulation 55, (1) (d), that any person guilty of an offence against this Regulation shall be liable on conviction on indictment to a minimum fine which will ensure that he makes no profit from the transaction, and it is provided that the fine, that is to say the amount which will ensure that he makes no profit from the transaction, need not be inflicted upon him, if the Court, having regard to any special circumstances, thinks that there is good reason for not imposing a fine, or for imposing a fine of less amount than the minimum fine. The question therefore arises whether there are in this case special circumstances which would entitle this Court, having regard to the way in which the matter has been put on behalf of the Crown, to take a course by which the fine could be remitted.

Although, so far as we are aware, this question has not fallen for determination under the Defence Regulations, there are several judgments with regard to special reasons in cases under the Road Traffic Act, and it appears to us

that the principle that is to be applied in considering special reasons under the Road Traffic Act is a principle which is equally applicable to a consideration of this present matter which is before us. I refer to one case, *WHITTALL v. KIRBY*, [1947] K. B. 194, where the Court held in dealing with a case under the Road Traffic Act "that a 'special reason' within the section is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is in other words a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, but directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence, is not a 'special reason'."

Here, although it may well be said that perhaps there had been no profit made in the long run owing to other losses which had occurred, that could afford no special reason in our opinion, because that would be a reason which applied to the offender rather than to the offence. But having regard to what has been said in this Court on behalf of the Crown in regard to the circumstances in which this offence was committed, we have come to the conclusion that this is a case in which we can say that there are special circumstances for not imposing a fine, and we therefore set aside the fine of £150 which was inflicted. In place of that the appellant will be bound over to be of good behaviour, and to come up for judgment if called upon within the next two years.

Sentence reduced.

Solicitors: Philip Conway, Thomas & Co., for appellant;
Solicitor for Customs and Excise, for the Crown.

1949.
April 26.

CARL LEITZ.

Oliver, J.,
Byrne, J.,
Sellers, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER,
MR. JUSTICE BIRKETT, MR. JUSTICE LYNKEY AND
MR. JUSTICE SELLERS.

JOSEPH CLUCAS.

1949.
May 10.

False Pretences—Bookmaker—False Statement by Backer as to Identity and Capacity—Money Paid on Winning Horse—Operative Inducement—Conspiracy—Repetition of False Pretence—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 32 (1).

The appellant and one R. were convicted of conspiring to obtain, attempting to obtain and obtaining money from bookmakers by false pretences. The two men had induced bookmakers to bet with them by representing that they were commission agents acting on behalf of a number of workmen who were placing small bets on horses, whereas in fact they were making bets in considerable sums of money on their own account. Some of these bets proved to be winning bets and in respect of these they received money from the bookmakers. One of the bookmakers refused to pay R. on a winning bet, and R. thereupon invited him to telephone to a certain number, which he represented as being the place of employment of the workmen in question, in order to obtain confirmation of R.'s story. The number in fact was that of a public telephone, near which the appellant was waiting to answer the bookmaker if he should communicate with the number given him by R.

Held, (i) that the conviction of obtaining money by false pretences must be quashed, as the effective cause of the payment by the bookmaker was not the false representation as to identity and capacity, but the fact that the horse backed won.

BUTTON, [1900] 2 Q. B. 597, distinguished.

(ii) That the conviction of conspiring to obtain money by false pretences must be affirmed, as, even apart from the evidence relating to R. having given the number of the public telephone to the bookmaker, there was abundant evidence of the conspiracy charged.

Appeal against conviction and sentence.

The appellant was convicted at Norfolk Assizes on February 3, 1949, of conspiring to obtain, attempting to obtain, and

obtaining money by false pretences and was sentenced by Hallett, J., to two years' imprisonment.

1949.
May 10.

JOSEPH
CLUCAS.

Goddard,
L.C.J.,
Oliver, J.,
Birkett, J.,
Lynskey, J.,
Sellers, J.

The appellant was convicted on six counts. In the first count the appellant was charged, with a man named Revell, with conspiracy to defraud a bookmaker named Gamble by falsely pretending that Revell was employed at an aerodrome and was in a position to act or was acting as a commission agent for the collection of bets from workmen employed there. The third count charged a similar conspiracy to defraud a bookmaker named Cranmer by the same and some additional false pretences. The fourth count charged both men with attempting to obtain a sum of money from Gamble by falsely pretending that some third person had asked them to place bets on a horse and that they were acting as agents in placing the bet. The fifth count charged both men with attempting to obtain a sum of money from Cranmer by the same or similar false pretences, and the seventh count charged the appellant only with obtaining a cheque from S. C. Cranmer and Co. by means of substantially the same false pretences.

The two men induced bookmakers to bet with them by representing that they were acting on behalf of a large number of workmen who were making small bets on various horse races, whereas in fact they were making bets in considerable sums of money on their own account. Some of the bets proved to be winning bets, and in respect of these they received money from the bookmakers. One of the bookmakers refused to pay Revell on a winning bet, and Revell thereupon repeated the false allegation and invited the bookmaker to telephone to a certain number which he represented as being the number of the place of employment of the workmen in question, in order to obtain confirmation of Revell's story. The number in fact was that of a public telephone near which the appellant was waiting to answer if the call from the bookmaker came through to the number given.

F. Honig, for the appellant :

Intent to defraud is a necessary ingredient of the crime of obtaining money by false pretences. The person alleged to

1949.
May 10.

JOSEPH
CLUCAS.

Goddard,
L.C.J.,
Oliver, J.,
Birkett, J.,
Lynskey, J.,
Sellers, J.

have been defrauded must have been induced by the false representations to act to his own injury in a monetary sense. The effective cause of the payment of money by the bookmaker in the present case was the winning of the horse backed, which was outside the control of the appellant and Revell and could not have been affected by the false representations made. There is a distinction between a gaming transaction and an ordinary commercial transaction where the monetary injury follows directly on the making of the false representation. The agreement between the appellant and Revell on the one hand and the bookmakers on the other was not enforceable, as the bookmakers would only pay if they desired to do so and no proceedings could have been taken to recover the debt. [He referred to *RE LONDON AND GLOBE FINANCE CORPORATION, LTD.*, [1903] 1 Ch. 728, at p. 732; *BENNET AND NEWTON* (1913), 9 Cr. App. R. 146, at p. 154; and *BASSEY* (1931), 22 Cr. App. R. 160, at p. 162.]

H. V. Boileau, for the Crown :

There was evidence of a continuity between the false pretence and the obtaining of the money, and it was for the jury to say whether such continuity existed. *BUTTON*, [1900] 2 Q. B. 597, is indistinguishable in principle from the present case. By making false representations a chance to bet with the bookmaker was obtained, and such chance would not have been obtained but for the false representations. If there was a continuing false pretence which operated on the mind of the bookmaker, there was an obtaining by false pretences, and it was a question of fact for the jury whether there was such a continuing false pretence. [He referred to *LEON*, 30 Cr. App. R. 120; [1945] 1 K. B. 13; *ABBOT* (1847), 2 Cox C. C. 430; and *MARTIN* (1867), L. R. 1 C. C. R. 56.]

THE LORD CHIEF JUSTICE : The appellant in this case was convicted along with a man named Revell before Hallett, J., at the last Assizes for Norfolk on six counts of an indictment which charged in the first count a conspiracy between the two

prisoners to defraud a bookmaker named Gamble by falsely pretending that Revell was employed at the Suttonbridge aerodrome and that Revell was in a position to act or was acting as a commission agent for the collection of bets for workmen on the said aerodrome. There was a third count alleging a similar conspiracy to defraud a bookmaker named Cranmer by the same false pretences and some additional false pretences. Then there was a fourth count in which both prisoners were charged that, with intent to defraud, they attempted to obtain from the first bookmaker a sum of money by falsely pretending that some third person had asked them to place bets on a horse and that they were acting as agents in placing that bet. The fifth count charged them that with intent to defraud they obtained from Cranmer a sum of money by making the same or similar false pretences; and the seventh count charged this appellant alone that he "with intent to defraud obtained from S. C. Cranmer and Co., a valuable security, namely a banker's cheque for £123 6s. 7d." by means of substantially the same false pretences.

The evidence showed that the two men, who obviously were thoroughly dishonest people, induced bookmakers to bet with them by representing that they were commission agents acting on behalf of a large number of workmen who were putting small bets on various races, whereas in fact they were making bets in considerable sums of money for themselves alone.

The main point which arises in the case and which arises on all the counts except count one, in respect of which there are particular circumstances with which I will deal in due course, can be stated in this way: Does a man who induces a bookmaker to bet with him by making false pretences as to his identity or as to the capacity in which he is putting on the bets obtain money by false pretences if he is fortunate enough, having made those pretences, to back a winning horse so that the bookmaker pays him? The case, as it was argued originally before a Court consisting of three Judges, raised certain points and the Court showed when they adjourned the hearing that there was no unanimity at that stage.

1949.
May 10.

JOSEPH
CLUGAS,

Goddard,
L.C.J.,
Oliver, J.,
Birkett, J.,
Lynskey, J.,
Sellers, J.

1949.
May 10.

JOSEPH
CLUCAS.

Goddard,
L.C.J.,
Oliver, J.,
Birkett, J.,
Lynskey, J.,
Sellers, J.

Consequently they adjourned it to be heard before a full Court of five Judges.

In the opinion of the Court it is impossible to say that there was an obtaining of the money by the false pretences which were alleged, because the money was obtained not by reason of the fact that the prisoners falsely pretended that they were somebody or acting in some capacity which they were not, but because they backed a winning horse as a result of which the bookmaker paid the sums obtained. No doubt the bookmaker might never have opened an account with these men if he had known the true facts, but we must distinguish between one contributing cause and the effective cause which led the bookmaker to pay the money. The effective cause which led the bookmaker to pay the money was the fact that these men had backed a winning horse.

It is perfectly true that in a decision of this Court in *LEON*, 30 Cr. App. R. 120, [1945] K. B. 136, it was held that, as bets on horse races are null and void, a charge will not lie against a fraudulent or dishonest backer for obtaining credit from a bookmaker because the credit he obtains is credit in respect of a null and void bet, but, granted here that these two men induced the bookmaker to bet with them by means of a false pretence, what the Court cannot see is that that false pretence was the false pretence which led to the payment of the money. What led to the payment of the money was the fact that these men backed a winning horse. They had put themselves in the position that if they backed the horse and lost, they had to pay the bookmaker and if they backed the horse and won they were entitled to receive the money. In the opinion of the Court, therefore, it cannot be said that the money was obtained by false pretences within the meaning of section 32 (1) of the Larceny Act, 1916.

Mr. Boileau has called the attention of the Court to certain cases, and no doubt the nearest case to this one and the only one which I think it is necessary to mention is *BUTTON*, [1900] 2 Q. B. 597. In that case the defendant, by representing that he was a person of the name of Sims, who was a very moderate

performer in athletic sports and was not known as a likely winner of races, managed to obtain from the committee of some athletic sports which were to be held at Lincoln a very substantial handicap in a race. He was in fact a man who had won a great many races and if the truth had been known he would have received either no handicap at all or a very moderate handicap instead of the very substantial handicap which he obtained. The Court held that by falsely representing himself to be someone whom he was not, thereby obtaining the substantial handicap which he did obtain, he obtained the prize by false pretences, because the pretence in question was a matter directly connected with the winning or not winning of the prize. He obtained for himself a winning chance. He got the handicap which he would not otherwise have got, and thereby enabled himself to win the race. We think that that case on the facts is clearly distinguishable from this case.

Now we have to consider the first count in the indictment, which was a count for conspiracy, and the facts relating to the conspiracy were these. Having already made the false pretence with regard to their identity and the capacity in which they were putting the money on, the two men backed a horse that won a race. Revell then went to collect the money. By this time the bookmaker had a suspicion that all was not right, and that these men were not the people whom they represented themselves to be. He was unwilling therefore to pay over the money without obtaining further assurances that Revell was the man whom he pretended to be. Revell repeated the false pretence, and went so far as to tell the bookmaker, Gamble, that he could ring up a certain number which, he said, was the number of the aerodrome or place where the workmen were supposed to be working. He gave the bookmaker the number and said if he did ring up that number he would get confirmation of the story. All this time, according to the evidence, the appellant was loitering about in the neighbourhood of the telephone kiosk which bore the number, to answer the telephone if the call came through. Clearly that shows that the two men were conspiring together. They conspired in the first place to

1949.
May 10.

JOSEPH
CLUGAS.

Goddard,
L.C.J.,
Oliver, J.,
Birkett, J.,
Lynskey, J.,
Sellers, J.

1949.
May 10.

JOSEPH
CLUCAS.

Goddard,
L.C.J.,
Oliver, J.,
Birkett, J.,
Lynskey, J.,
Sellers, J.

tell these lies to the bookmaker. Even without the evidence that the appellant was waiting near the telephone kiosk to answer any inquiry which came through, there was abundant evidence on which the jury could find that Revell, in going to collect the money and repeating the story, was acting in concert and was acting in pursuance of the conspiracy. Therefore what he did was evidence against his co-conspirator. It is true that there was substantially no direction to the jury on this point or on those lines, but both prisoners gave evidence. The evidence which they gave admitted the facts which I have stated with regard to the telling of the lies to the bookmaker and the putting on of bets in assumed names. Therefore, in those circumstances the absence of any direction on this matter could not have made any difference, because on the admitted evidence and on the evidence of the prisoners themselves, no reasonable jury could have come to any other conclusion than that they had conspired together to cheat the bookmaker of this sum of money. Therefore, with regard to count 1 the conviction must stand. With regard to the other counts the conviction must be quashed. The Court will reduce the sentence to one of twelve months' imprisonment, to date from conviction.

Conviction quashed in part.

Sentence reduced.

*Solicitors : Peacock & Goddard, for Jackson & Walton, King's
Lynn, for the Crown.*

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE LYNSEY AND
MR. JUSTICE JONES.

BERTHA ELIZABETH JENNINGS.

1949.
May 30.

Indictment—Amendment—Using Ration Document with Intent to Deceive—Document Specified to be a Particular Ration Book—Case for Prosecution that Reference Leaf from Earlier Book was Used—Words Specifying Particular Book Struck Out—Prejudice to the Defendant—Conviction Quashed—Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), s. 5 (1).

The appellant was originally charged with obtaining ration books by false pretences and with forging an application for the replacement of a ration book, and a count was added to the indictment charging her with unlawfully using a ration document, contrary to art. 27 (e) of the Food Rationing (General Provisions) Order, 1947, the Particulars of Offence alleging that "she, with intent to deceive, did use a ration document, to wit, a ration book" with a specified number, which had been issued to her on July 12, 1948. During the course of the trial, counsel for the prosecution stated that his case on the third count really was that the appellant had on July 12, 1948 used the reference leaf from the ration book of an earlier year in order to get her new book, and applied for the indictment to be amended by striking out the words in the third count which specified the ration document to be the ration book issued on July 12, 1948. Counsel for the defence objected, but the Court allowed the amendment. The appellant was acquitted on the first two counts, but convicted on the third count.

Held, that the appellant must have been prejudiced by having to meet the charge of an offence which was a totally different offence from that originally charged in the third count, and that the amendment was, accordingly, one which ought not to have been made. The conviction must, therefore, be quashed.

HUGHES (1927), 20 Cr. App. R. 4, followed.

Appeal against conviction and sentence.

The appellant was convicted at Surrey Quarter Sessions on January 19, 1949, of unlawfully using a ration document,

1949.
May 30.

BERTHA
ELIZABETH
JENNINGS.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

contrary to art. 27 (e) of the Food Rationing (General Provisions) Order, 1947, and was sentenced by the Deputy-Chairman to a fine of £25.

The appellant was originally charged with obtaining ration books for herself and her child on September 20, 1946, by falsely pretending that she had lost the ration books previously issued to her for the appropriate period, and secondly, with forging on September 4, 1946, a public document, namely an application for replacement of ration books, purporting to show that she had lost the ration books of herself and her child on September 2, 1946. A third count was added to the indictment charging her with unlawfully using a ration document, contrary to art. 27 (e) of the Food Rationing (General Provisions) Order, 1947, the particulars of offence being that "between July 12, 1948, and August 10, 1948 [she], with intent to deceive, did use a ration document, to wit, a ration book No. N710166", which had been issued to her on July 12, 1948. During the course of the trial counsel for the prosecution stated that his real case on the third count was that the appellant had used, not the ration book issued to her on July 12, 1948, but had on that date used the reference leaf from the ration book of an earlier year to obtain a new book. The Deputy-Chairman then suggested that the third count ought to be amended, and despite a protest from defending counsel, it was amended by striking out the words which specified the ration document to be the ration book named. The appellant was acquitted on the first two counts, and convicted on the third count.

Eric Myers, for the appellant:

The amendment is one which should not have been allowed. It gravely prejudiced the appellant, and compelled her to meet the charge of an offence quite different from that originally specified in the particulars of offence. The cases of *HUGHES*, 20 Cr. App. R. 4, and *ERRINGTON*, 16 Cr. App. R. 148, are directly in point, as showing that the Court will not allow a conviction to stand where an amendment to an indictment has

improperly been allowed, particularly when it has been made at a late stage in the case.

1949.
May 30.

BERTHA
ELIZABETH
JENNINGS.

R. G. Dow, for the Crown :

The powers given to a Court to amend an indictment under s. 5 of the Indictments Act, 1915, are extremely wide, but it must be conceded that the prosecution could not have proceeded with the case originally laid in the third count and were obliged to reconstruct their case on that count during the course of the trial.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

HUMPHREYS, J.: This appellant appeals by leave of the single Judge to whom she applied for leave to appeal against her sentence. She is a woman who probably has no legal knowledge, and what struck her was that she had been fined £25 in a case where she thought she ought to have been acquitted. It is not uninteresting from the public point of view, as indicating the care with which these things are done, to state that the learned Judge came to the conclusion that, quite apart from the question of sentence, there was a serious question to be considered whether the appellant was properly convicted at all, although she was not asking for leave to appeal against conviction. He therefore gave leave to appeal against conviction as well as sentence. The sentence is a trifling matter because she was only fined and it was not a heavy fine. The main point which is taken, and the only point to which it is necessary to refer, is this: One of the grounds of appeal is that the learned Deputy-Chairman erroneously allowed an amendment to count 3 of the indictment, without the consent of the defendant herself or her counsel.

The indictment alleged in the first count that the defendant obtained property by false pretences, which involves an intent to defraud, and the Particulars of Offence alleged were that on September 20, 1946, she, with intent to defraud, obtained from somebody called Ann Jennings (who, I take it, merely happens to have the same surname as the appellant) a ration book for a child and a ration book for an adult in respect of

1949.
May 30.

BERTHA
ELIZABETH
JENNINGS.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

the period 1946/47 by falsely pretending that she had lost the ration books previously issued to her in respect of the said period. That is a perfectly plain allegation, the issue being whether the jury believed that the statement which she made on the date when she got a new ration book, namely, that she had lost her ration book, was true or not. The second count charged her with forgery, contrary to section 4 of the Forgery Act, 1913, which involves an intent to defraud or to deceive. The allegation was that she on September 4, 1946—that is at an earlier date than the date named in the first count—with intent to deceive, forged a public document, to wit, an application for replacement of a ration book or other document lost, stolen or destroyed, purporting to show that she had lost her two ration books for herself and her child on September 2, 1946. Those were, in substance, the matters which were originally charged against her, but the person who drew the indictment at quarter sessions added a third count in which he alleged that she unlawfully used a ration document, contrary to art. 27 (e) of the Food Rationing (General Provisions) Order, 1947. By that article it is provided: “No person shall— . . . (e): with intent to deceive, forge, or use, or lend to, or allow to be used by any other person any ration document”. Then there are definitions of “ration document” which make it clear that anything to do with rationing which comes from the public authority is a ration document. The Particulars of Offence are that: “between July 12, 1948, and August 10, 1948, she, with intent to deceive, did use a ration document, to wit, a ration book No. N710166”. That is the number of the ration book which in fact was issued to her upon July 12, 1948.

She came to trial on those three counts. The jury, having heard all the evidence, acquitted her of obtaining the first book in 1946 by the false pretence that she had lost her previous book. They also acquitted her of having on September 4, 1946, forged a public document, being an application for replacement, which seems to be really the same thing put in another way and put as an offence against the Rationing Order rather than an offence against the ordinary criminal statutes.

On the third count there was a good deal of discussion on the exact meaning of the count quite early in the case and a great deal more discussion at a later period after most of the evidence had been given. On the face of it, it was quite plain; it was a charge of using with intent to deceive the ration book which was proved to have been given to her on July 12, 1948. The understanding of an ordinary person accused of such an offence would be that somebody was going to prove that she had obtained rations on a book which she had no right to have at all, but no such evidence was given. It turned out that what the prosecution was saying was this: "On July 12, 1948, you got a ration book. Now you cannot get a ration book according to the rules, regulations and practice of the Food Office without at least two things happening; you must produce either your old book and ask that that be replaced, or you may produce a leaf issued to you with the earlier book for use on such an occasion as the occasion on which you are presenting it, showing that your old book has expired by effluxion of time. The other thing which you must do is to show that you are a person properly in possession of your own ration book or application or leaf by presenting your identity card. Those are the rules". That was practically all that the prosecution were in a position to prove except that they did show that somehow or other there were in the possession of the Food Office two documents purporting to be signed by the appellant on that date, which are leaves taken out from two books in 1947. The prosecution said: "Our case is that when she got this new book she must have produced one of those leaves and she had no right to have it at all. That is the offence with which we charge her, because by means of producing those leaves which she ought not to have done she got this new book". But what they charged in the third count was something totally different; they charged her not with obtaining the new ration book by fraud, false pretences, forgery, or with intent to deceive or anything of the sort, but they alleged that, having got that book, she used it with intent to deceive, which, as everyone must agree, is a totally different

1949.
May 30.

BERTHA
ELIZABETH
JENNINGS.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

1949.
May 30

BERTHA
ELIZABETH
JENNINGS.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

offence and would be understood by any member of the public as being a totally different offence.

When that matter was made clear, even learned counsel for the prosecution, who knew all about the case, felt a little difficulty in following with the evidence the different counts in the indictment, and having had his attention drawn to the exact words of count 3 he said this: "I am afraid that, contrary to my remarks of a few moments ago"—when he had been submitting that there was ample evidence on the third count to go to the jury, and counsel for the defence was saying that there was not—"I shall have to ask for an amendment to the indictment, omitting the words 'ration book No. N710166', because it is not my case that she used the book got on July 12 with intent to deceive". In the plainest terms, therefore, learned counsel was saying: "I have charged a perfectly simple offence in quite simple language and I now admit that there is no evidence in support of that count". Then he said: "But it is my case that she used some totally different document, the reference leaf from the book of an earlier year on that date, July 12, to get a new book". Nothing could have been plainer or more accurate. Upon that, in our view, there was only one course which the learned Deputy-Chairman could then take, and that was to say: "Very well, then, when the time comes I must direct the jury that they must acquit upon that count because, as you have said, there is no evidence in support of it, and it is not your case." There would have been an end to that matter, and, as the jury acquitted on the first and second counts, the appellant would have been acquitted altogether. But what was done was that the learned Deputy-Chairman himself suggested that the indictment should be amended. He was the first person to suggest it, and when counsel for the prosecution, as a last desperate hope, said: "I should like the indictment amended to what really is my case here", the learned Deputy-Chairman agreed. The question in this appeal is: Had he any power to exercise the discretion which no doubt he has, in that way?

He acted under the terms of the Indictments Act, 1915,

which provides in section 5 (1): "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice . . .".

Counsel for the defendant objected strongly to this amendment and he has referred us to a case on the subject, *HUGHES* (1927), 20 Cr. App. R. 4, where the Court had to consider this very matter, that is to say, in what circumstances an amendment may be said to be properly made so as not to contravene those last words of section 5 of the Indictments Act. The language of the Lord Chief Justice (Lord Hewart) in giving the judgment of himself, Avory and Talbot, JJ., was as follows: "The appellant alleges that the counts in the indictment relating to false pretences"—there was an allegation of obtaining money by false pretences—"disclose no offence in law; that the learned Judge was wrong in allowing all the counts for false pretences to be amended on the close of the case for the prosecution by the substitution of another alleged false pretence for that stated in the indictment". Upon that the Court held that the objection by the defence was well-founded, inasmuch as that which had been alleged in the indictment in all those counts was in law no false pretence, but a statement of something that would happen in the future, not a statement of an existing fact. Then the prosecution having argued that, in spite of that, no injustice would be done to the appellant and that the matter was purely technical, the Lord Chief Justice said: "The appellant says: 'I was seriously prejudiced by having to answer charges containing a different false pretence from that contained in the counts of the indictment before it was amended' ". That was, in the view of the Court, something which might seriously prejudice the accused person, and in the opinion of this Court far more likely is it, and far truer is it, to say of the present appellant that she was prejudiced by having to deal with something which in its

1949.
May 30.

BERTHA
ELIZABETH
JENNINGS.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

1949.
May 30.

BERTHA
ELIZABETH
JENNINGS.

Humphreys,
J.,
Lynskey, J.,
Jones, J.

essence was a totally different offence from that charged in the indictment, and we think that that amendment was wrongly made.

We have also been referred to another case in which very much the same thing was said by a much earlier Court, **ERRINGTON** (1922), 16 Cr. App. R. 148. In that case the indictment for false pretences was amended by charging new false pretences. The case is not very well reported and it is not very clear whether a new count was added to the indictment, which might properly be done under the Indictments Act with the leave of the Court, or whether, as in the present case, the indictment was amended by alteration of one of the counts; but whichever course was taken, the Court came to the conclusion that what was done was contrary to the intention of the Indictments Act and the conviction in that case was quashed.

We think upon the reasoning of those two cases that it would be wrong to allow this conviction to stand, and for that reason the appeal is allowed and the conviction is quashed.

Conviction quashed.

Solicitors : Wontners, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD
AND MR. JUSTICE DEVLIN.

H. SHERMAN, LTD.

1949.
June 20.

Corporation—Indictment—Signing of Bill—No Written Order by Examining Magistrate Giving Prosecutor Leave to Prefer Bill—Validity—Duty of Clerk of Assize—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 33 (1), as amended by Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36), s. 1.

By section 33 (1) of the Criminal Justice Act, 1925, as amended by section 1 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, "Where a corporation is charged, whether alone or jointly with some other person, with an indictable offence, the examining justices may, if they are of opinion that the evidence offered on the part of the prosecution is sufficient to put the accused corporation upon trial, make an order empowering the prosecutor to prefer at assizes or quarter sessions, as the case may be, a bill in respect of the offence named in the order, and for the purpose of any enactments referring to committal for trial (including this Act) any such order shall be deemed to be a committal for trial . . .".

An order under the above subsection must be in writing under the hand of the magistrate and authenticated by the seal of the Court. Such an order need not be drawn up immediately on the conclusion of the proceedings before the magistrate, but must be complete at the time of the signing of the bill of indictment. If it is not then complete, the indictment should be quashed.

Per curiam : It is the duty of the clerk of assize, in any case in which it is proposed to indict a company, to be satisfied, before he signs the bill, that the necessary order has been made.

Appeal against conviction.

The appellant company was convicted at Glamorgan Assizes on March 14, 1949, of offences against the Betting Act, 1853, and was sentenced by Sellers, J., to fines amounting in all to £200.

1949.
June 20.

H. SHERMAN,
LTD.

—
Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

At the end of the hearing before the magistrate, the magistrate stated that he committed the company for trial, but at the time of the signing of the bill of indictment by the clerk of assize, no written order had been made by the magistrate under s. 33 (1) of the Act of 1925 empowering the prosecution to prefer a bill at the assizes. Subsequently, before the arraignment, an order was made by the magistrate in writing complying with the subsection. Counsel for the company moved to quash the indictment on the ground of non-compliance with s. 33 (1) of the Act of 1925, but the Judge dismissed the motion and the trial proceeded.

Gilbert Beyfus, K.C., and Roderic Bowen, for the appellant company.

Arthian Davies, K.C., and Meurig Evans, for the Crown.

The arguments appear from the judgment.

THE LORD CHIEF JUSTICE: The appellant company was indicted at Glamorgan Assizes in respect of certain offences against the Betting Act, 1853. The company being called upon to plead, Mr. Beyfus took the point that the indictment against the company was bad because certain provisions of certain Acts of Parliament had not been complied with. It was said that there was no order in force by the examining magistrate giving leave to the prosecutor to prefer the bill of indictment, and that, as there was no order in force, no bill of indictment could be preferred. The learned Judge overruled that contention, held that a written order was not necessary, and further held that, as the magistrate when the case was before him had said that he committed the defendants for trial, that was sufficient compliance with the provisions of the Criminal Justice Act, 1925.

It is necessary, before I state the grounds upon which this Court has decided this case, to say a word about the facts. The company, along with two other persons, had been charged before the magistrate with the offences. The magistrate was

not dealing with the offences himself, but at the end of the hearing before him said that he committed all the defendants for trial. That was accepted by both sides and was stated to the Judge at the trial. On the afternoon before the trial, inquiry was made by the solicitor for the defence of the magistrate's clerk whether any order had been made by the magistrate under section 33 of the Criminal Justice Act, 1925, empowering the prosecutor to prefer a bill at the assizes, and he was told that no order had been made. Thereupon by the next morning, before the arraignment, an order was made by the magistrate in writing which would comply with the provisions of the statute and dated *nunc pro tunc*, that is to say, dated back to January 25, 1949. I do not think that there is any reflection on the magistrate for having done that, nor do I think the fact that he did not draw up the order on the date when he heard the case would make any difference. If the order had to be made, it could be made at a date subsequent to the date on which the magistrate actually announced his decision, provided that it was otherwise made in time.

We have no information when the indictment was actually signed by the clerk of assize. Before I deal with that point, I will state what I understand the law to be. At common law it was possible for anybody to prefer a bill of indictment to a grand jury against either an individual or against a corporation, and if the grand jury returned a true bill that converted the bill into an indictment, and to that indictment the defendant had to plead. That remained the common law subject to the Vexatious Indictments Act, 1859, which restricted the right of a person to prefer a bill to a grand jury in respect of certain classes of offences. It remained the law until the passing of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which abolished grand juries. During the war of 1914/18, for the purpose of saving manpower in that war, the Grand Juries (Suspension) Act, 1917, was passed, and while that Act remained in force the position was in substance the same as it became after 1933.

Since 1933 it is no longer open to any subject of the King

1949.
June 20.

H. SHERMAN,
LTD.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

1949.
June 20.

H. SHERMAN,
LTD.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

to prefer a bill of indictment of his own motion unless one or other of certain preliminary steps has been taken. There must either have been a committal for trial by examining justices sitting under the Indictable Offences Act, 1848, or leave must have been granted by a judge of the High Court, or an order under the Perjury Act must have been made by the Court before whom the perjury was committed. The voluntary bill, as it used to be called, no longer exists. It is still open to a person who desires to prefer a bill, as for instance in a case where magistrates have refused to commit for trial, to apply to a Judge for leave to prefer a bill, but it will no longer be a voluntary bill because it will be preferred by permission of a Judge. The old position under which any person on the first day of assizes could take a bill of indictment and hand it to the clerk of assize and require that it should be put before the grand jury has gone.

During the time that the Grand Juries (Suspension) Act, 1917, was in force, a company called the Daily Mirror Newspapers, Ltd., was indicted at the General Quarter Sessions for Hertfordshire for an offence, and objection was taken that the indictment was bad because there could have been no committal for trial of the company. "Committal for trial" is defined in section 27 of the Interpretation Act, 1889: "In every Act passed after the commencement of this Act, the expression 'committed for trial' used in relation to any person shall, unless the contrary intention appears, mean, as respects England and Wales, committed to prison with the view of being tried before a judge and jury, whether the person is committed in pursuance of section twenty-two or of section twenty-five of the Indictable Offences Act, 1848, or is committed by a court, judge, coroner, or other authority having power to commit a person to any prison with a view to his trial, and shall include a person who is admitted to bail upon a recognisance to appear and take his trial before a judge and jury". A company cannot be committed to prison and cannot be held to bail, and therefore it was decided in *DAILY MIRROR NEWSPAPERS, LTD.*,

[1922] 2 K. B. 580, that so long as the Grand Juries (Suspension) Act, 1917, was in force, a bill could not be preferred to a Court unless one of the three things had happened, either committal for trial or an order of the Judge or (in the case of perjury) an order made under the Perjury Act.

As there had been no order by the Judge, it followed that unless there had been a committal for trial, the indictment was bad because there was no power to prefer it, and the Court held that the indictment was bad. Therefore, I suppose in consequence of that decision, the Criminal Justice Act, 1925, section 33, provided: "Where a corporation is charged, whether alone or jointly with some other person, with an indictable offence, the examining justices may, if they are of opinion that the evidence offered on the part of the prosecution is sufficient to put the accused corporation upon trial, make an order empowering the prosecutor to present to the grand jury at assizes or quarter sessions, as the case may be, a bill in respect of the offence named in the order, and for the purpose of any enactments referring to committal for trial (including this Act) any such order shall be deemed to be a committal for trial".

Then follow certain provisos which are immaterial. It seems to me that that Act did not take away the old common law right of preferring a bill against a corporation, but it was dealing with a case where a corporation had been charged before magistrates and the magistrates had determined to send the case forward for trial. That was the provision in the Act of 1925.

Then came the Act of 1933 which abolished grand juries. That Act provides (s. 1): "Subject to the provisions of this section grand juries are hereby abolished, but where a bill of indictment has been signed in accordance with the provisions of this Act, the indictment shall be proceeded with in the same manner as it would have been proceeded with before the commencement of this Act if it had been found by a grand jury". Then, in s. 2 (1): "Subject to the provisions of this section, a bill of indictment charging any person with an

1949.
June 20.

H. SHERMAN,
LTD.

—
Goddard,
L.C.J.,
Streetfield,
J.,
Devlin, J.

1949.
June 20.

H. SHERMAN,
LTD.

Goddard,
L.C.J.,
Streetfeild,
J.,
Devlin, J.

indictable offence may be preferred by any person before a Court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the Court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly: Provided that if the Judge or Chairman of the Court is satisfied that the said requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly". Then the important subs. (2) is this: "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a Judge of the High Court or pursuant to an order made under section nine of the Perjury Act, 1911". So there again the same position arises that the old common law right is taken away and a bill can be preferred only if there has been a committal for trial, or on the order of a Judge.

In this case, the first point that was argued by Mr. Arthian Davies in support of the indictment was that the magistrate in committing for trial had in effect given leave to the prosecutor to prefer a bill under the provisions of section 33 of the Criminal Justice Act, 1925. He supported that by saying that the statute did not require the order to be in writing, and the learned Judge so held. With all respect to the learned Judge, this Court is unable to take that view. Where a statute makes an order of a particular character a necessary condition precedent to the doing of some other act, we think that we must construe that section as meaning that the order must be an order in writing, and drawn up either under the hand of the presiding magistrate or with the seal of the Court. In fact, I think it ought to have the seal of the Court. The order must be authenticated, and if any question arises whether or not an order has been made, the right way of proving that

order is by producing the order, and that can be done only if it is an order in writing. This Court does not feel any doubt that it ought to construe the section as meaning that the Court must make the order in the way in which an order of the Court is usually—in fact, I think, invariably—made, that is to say, it must be drawn up and be in writing and authenticated. There was at the time no order drawn up and authenticated. The magistrate in fact committed for trial, and on the analogy of the *DAILY MIRROR NEWSPAPERS CASE* (*supra*) he had no power to do so, because a corporation cannot be committed for trial. He ought to have made an order. If having made up his mind that there was a case to go for trial, he had drawn up the order afterwards, there would have been no objection, I think, to the mere fact that he did not have it drawn up on the actual day. If a Court gives its decision verbally, as, of course, it almost invariably does, the order is often drawn up afterwards. It may be drawn up on the same day; it may be drawn up one or two or three days after, or even a considerable time after. One knows that in the High Court, orders (for instance, in the Chancery Division, which have to be passed by the Registrar and so forth) are not in fact drawn up until quite a considerable time after the learned Judge has given his judgment. So, too, in the King's Bench Division orders are very often not drawn up till some days after the trial. If the order had been drawn up, there could be no objection to it merely on the ground that it had not been drawn up on the day on which the learned magistrate gave his decision that the case should go for trial.

In fact, as we know now, this order giving leave to prefer a bill (which, as I have said, is a different thing from a committal for trial) was not drawn up until the morning of the arraignment. I think we must assume that the bill of indictment by that time had been signed, because I am quite certain that if the bill of indictment had not been signed and the clerk of assize had been waiting for this order to come through, he would have said to the learned Judge: "The order came through this morning and I signed the bill after I got it". In

1949.
June 20.

H. SHERMAN,
LTD.

—
Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

1949.
June 20.

H. SHERMAN,
LTD.

—
Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

any case, we think we cannot refuse to apply the maxim *omnia praesumuntur rite esse acta* because, when the challenge to the indictment was made, it would have been possible for the prosecution to have said, if it had been in anybody's mind, "the bill was not signed till a moment ago".

It follows from what I have said, that the signing of the bill was the critical moment, by reason of the provisions of the Act to which I have just referred. The bill becomes an indictment as soon as it is signed. It is not necessary to deal with the Rules, because those deal with the preferring of copies of the bill to the proper officers of the Court and provide that "except with the leave of the Judge or Chairman, no bill of indictment shall be preferred at any assizes after the first working day of those assizes or sessions". That refers only to the preferring, not to the signing, and that rule has been held to apply only to cases where there has not been a proceeding before justices.

We base our decision on this ground: In the particular circumstances it is right to assume that the order was not made by the stipendiary magistrate before the bill was signed. That being so, when the bill was signed and the indictment became effective, there had not been a compliance with s. 33 of the Criminal Justice Act, 1925. There had been a committal for trial which was nugatory. The position would have been the same as if the magistrate had refused to commit for trial. If he had refused to commit the company and the other defendants for trial, the prosecution could still have gone to a Judge in Chambers and obtained leave to prefer a bill, but if they had obtained leave to prefer a bill it would be wrong to say that there had been a committal for trial.

For the reasons which I have endeavoured to express, the Court is of opinion that effect must be given to the preliminary point which Mr. Beyfus took, and we hold that this bill of indictment is bad against the company.

It follows from what I have said—and I desire to repeat by way of emphasis—that it is the duty of the clerk of assize, in any case in which it is proposed to indict a company, to be

satisfied before he signs the bill that the necessary order has been made.

Conviction quashed.

1949.
June 20.

H. SHERMAN,
LTD.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

Solicitors: Stuart Hallinan, Hill & Mackintosh Thomas, Cardiff, for the appellant company; S. Tapper Jones, Cardiff, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD,
AND MR. JUSTICE DEVLIN.

PERCIVAL JOHN ERNEST WAY.
WOOLF NATHAN SHERMAN.

1949.
June 20;
July 11.

Betting—Charge Against Company of Using Office for Betting with Persons Resorting Thereto—Charge against Office Manager and Clerk of Aiding and Abetting—Attendance by Runners at Company's Offices—Betting Clocks Handed to Runners—Return with Betting Clocks Containing Slips and Money—No Resort to Office by Punters—Betting Act, 1853 (16 & 17 Vict. c. 119), s. 8.

A company was charged with using its office for the purpose of betting with persons resorting thereto and the appellants, who were the office manager and clerk of the company, were charged with, and convicted of, aiding and abetting the offence. It was proved that on the morning of the day in question runners attended at the company's offices and received betting clocks, and that during the afternoon and evening they returned with their betting clocks containing betting slips and, in some cases, money as well. The punters did not in any case resort to the office.

Held, that it was for the prosecution to establish that, when the runner returned to the company's office in the afternoon

1949.
June 20;
July 11.

PERCIVAL
JOHN ERNEST
WAY.
WOOLF
NATHAN
SHERMAN.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

with his betting clock containing slips and possibly money, he was, either as principal or agent, making a bet with the company; and that, there being no material from which the jury could draw that inference, the convictions must be quashed.

Appeals against conviction.

The appellants were convicted at Glamorgan Assizes on March 14, 1949, of aiding and abetting a company called H. Sherman, Ltd., in the commission of offences against the Betting Act, 1853, and were sentenced by Sellers, J., to fines of £200 and £100 respectively.

The company was indicted as the principal offender, and was convicted, but the Court of Criminal Appeal held that a motion to quash the indictment ought to have succeeded (see *ante*, p. 151). The first count charged the company that on November 10, 1948, it used an office in its premises for the purpose of betting with persons resorting thereto, and the second count charged it with using the same office for the purpose of money being received on behalf of itself as or for the consideration for an agreement to pay thereafter money on a contingency relating to horse races. The appellants were charged as aiders and abettors on both counts.

On the morning of November 10, runners attended at the company's office and received betting clocks. During the afternoon and evening they returned with their betting clocks containing the betting slips which they had taken that day and in some cases money as well. No punters resorted to the office.

Gilbert Beyfus, K.C., and Roderic Bowen, for the appellants.

Arthian Davies, K.C., and Meurig Evans, for the Crown.

Cur. adv. vult.

July 11. The judgment of the Court was read by DEVLIN, J. The two appellants, Sherman and Way, were on March 14, 1949, at Cardiff Assizes convicted of aiding and

abetting a company called Harry Sherman, Ltd., in the commission of offences against the Betting Act, 1853; and were each sentenced to be fined £200 and £100 respectively. Harry Sherman, Ltd., carries on a betting business in Cardiff and the two appellants are employed by it as office manager and clerk respectively. The company was indicted as the principal offender but for reasons already given this Court has quashed that indictment (see *ante*, p. 151). Counsel for the two appellants, Sherman and Way, accepts, subject to a qualification to which I shall later refer, that if the company is guilty of the offences charged the two appellants are likewise guilty of aiding and abetting. Accordingly the substantial question in the appeal is whether the company committed either of the offences alleged in the two counts of the indictment. Counsel for the appellants submits that there was no evidence fit to go to the jury on either count and, alternatively, that there was misdirection.

The first count charges that on November 10, 1948, the company used an office in its premises at Cardiff for the purpose of betting with persons resorting thereto. The facts material to this charge are short and not in dispute. On the morning of Wednesday, November 10, certain persons, in this case referred to as "runners", attended at the company's offices and each received an instrument known as a betting clock. This instrument enables the runner to record accurately and, it is hoped, beyond the possibility of fraud, the exact time at which he receives a betting slip from a punter. Thus the runner having received slips in relation to one or more races to be run, say, at 1.30, would put the slips in one or more bags and insert the bags in the clock; the time of insertion would automatically be registered so that there could be no doubt whether or not the bets were taken before the result of the race could be known. During the afternoon and evening of November 10, these runners returned to the company's office with their betting clocks containing the slips they had taken that day and in some cases money as well. It is therefore common ground that the runners resorted to the office and that

1949.
June 20;
July 11.

PERCIVAL
JOHN ERNEST
WAY.

WOOLF
NATHAN
SHERMAN.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

1949.
June 20;
July 11.

PERCIVAL
JOHN ERNEST
WAY.
WOOLF
NATHAN
SHERMAN.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

they were the only persons who did. The punters did not. Accordingly, the only question is whether the runners resorted to the office "for the purpose of betting".

It appears to the Court that the natural inference to be drawn from the facts set out above is that the runner was the agent of the company to make bets; that he made the bet when he accepted the slip and put it in his clock, acts which took place outside the company's office; and that he resorted to the office for the purpose of giving an account of his transactions and not for the purpose of betting. The prosecution puts the matter differently. They say that the runner resorted to the office either for the purpose of making bets as agent for the punter and on his behalf or for the purpose of making bets himself with the company by way of reinsurance of bets he had already made as a principal with the punter. On the former view, the runner did not make a bet when he received the slip; he treated it as an offer which on behalf of the punter he conveyed to the company; if the company accepted the offer, it did so in its own office where the bet was, therefore, made. It is obvious, and is not disputed by the prosecution, that bets made when runners returned to the office must in many cases have been made on races that had already been run and the result of which was known. Accordingly, if this view is correct the company would frequently be able to decide in the light of the result of a race whether to accept or reject a bet made on it. If the alternative view is correct and the bets were being made by the runner by way of reinsurance, then the agreement between the company and the runner must be that if the runner paid over his winnings on bets made earlier in the day, the company would reimburse him his losses on similar bets; whether such an agreement is a bet is open to question. It was, however, for the prosecution to establish that when the runner arrived at the office on the afternoon of November 10 and handed over his betting clock, containing slips and possibly money, he was then, either as principal or agent, making a bet with the company. We do not think that there is any material from

which a jury could draw that inference. We think therefore, with respect to the learned Judge who ruled otherwise, that the submission that there was no evidence on this count to go to the jury is correct and that the conviction on it must be set aside.

The second count alleges that the company used an office at its premises for the purpose of money being received on behalf of itself as or for the consideration for an agreement to pay thereafter money on a contingency relating to horse races. On this count it is common ground that the office was used for the purpose of receiving money for bets but that the prosecution cannot succeed unless it can establish that the bets were ready-money bets, that is to say, that when the money was given to the runner it was given to him as a stake in respect of a bet on a contingency which had not yet taken place, and not as payment of a loss incurred on some earlier bet. Counsel for the appellants agreed that if the runners were to the knowledge of the company making ready-money bets it could not be disputed that the office was being used for the purpose of ready-money betting.

We think that there was evidence fit to be considered by the jury that the runners were making ready-money bets.

[His Lordship, having referred in detail to the evidence and the summing-up, concluded:]

The learned Judge had the difficult task of explaining to the jury rather intricate questions of the type that so often arise for consideration under the Betting Act, 1853. He devoted by far the larger part of his summing-up to the first count; and we think with respect that, when he came to deal with the second count, he did not formulate with sufficient clarity the points which the jury had to consider and that he overlooked a number of considerations favourable to the defence, thus inadvertently presenting to the jury a one-sided view of the case. For these reasons we think that the

1949.
June 20;
July 11.

PERCIVAL
JOHN ERNEST
WAY.
WOOLF
NATHAN
SHEEMAN.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

1949.
June 20;
July 11.

conviction on the second count must be set aside, and accordingly the appeal is allowed.

Convictions quashed.

PERCIVAL
JOHN ERNEST
WAY.
WOOLF
NATHAN
SHERMAN.

The Court ordered that there should be one set of costs, and that the appellants should have half their costs.

Goddard,
L.C.J.,
Streatfeild,
J.,
Devlin, J.

Solicitors : Stuart Hallinan, Hill & Mackintosh Thomas, Cardiff, for the appellants; S. Tapper Jones, Cardiff, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER AND
MR. JUSTICE STABLE.

DENNIS BROWES.

1949.
June 21,
July 15.

Sentence—Supervision after Discharge from Prison—Conviction “on Indictment”—Committal to Quarter Sessions for Sentence—Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), ss. 22, 29.

By section 22 of the Criminal Justice Act, 1948 : “Where a person is convicted on indictment on an offence punishable with imprisonment for a term of two years or more and that person (a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section”, which require him to give his name and address to an appointed society and be under their supervision.

A person committed to quarter sessions for sentence under

section 29 of the Act is to be treated as having been convicted "on indictment" for the purposes of section 22.

1949.
June 21,
July 15.

Appeal against sentence.

The appellant was convicted at Leicester City Magistrates' Court of larceny of a motor car, and was committed to Leicester City Quarter Sessions for sentence under s. 29 of the Criminal Justice Act, 1948. On April 26, 1949, he was sentenced by the Recorder to four years' corrective training, but the Court of Criminal Appeal quashed that sentence on the ground that the provisions of s. 23 of the Act had not been complied with in that the appellant had not been specifically asked by the Recorder whether he admitted the previous convictions set out in the notice served upon him, and substituted a sentence of 18 months' imprisonment.

DENNIS
BROWES.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

J. N. Watkins, for the appellant.

Maxwell Turner, for the Crown.

THE LORD CHIEF JUSTICE: The appellant having been convicted of the larceny of a motor car, was sentenced by the learned Recorder of the City of Leicester to four years' corrective training under section 21 of the Criminal Justice Act, 1948.

This case was before the Court on June 21, and, for reasons which the Court then gave, which I will repeat today, the Court set aside the sentence of corrective training because they thought that the conditions laid down in the statute had not been followed, and substituted a sentence of imprisonment. Under section 21, it is provided: "Where a person who is not less than twenty-one years of age (*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (*b*) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, then, if the Court is satisfied that it is expedient with a view to his reformation", and so forth, "the Court may pass, in lieu of any other sentence, a sentence of corrective training for such term of not less than two nor more than four years as the Court

1949.
June 21,
July 15.

DENNIS
BROWES.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

may determine". The section then contains provisions as to the serving of notices on the prisoner of the convictions which it is said he has suffered so as to show that he is a person who is qualified for a sentence of corrective training. Section 23 provides: "For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section"—with which I shall deal in a moment; it is the section under which he has to notify his address to a particular society—"no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the Court at least three days before the trial that it is intended to prove the conviction or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury. (2) For the purposes of this section, evidence that a person has previously been sentenced to corrective training or preventive detention shall be evidence of the convictions and sentences which rendered him liable to that sentence".

The slip, which was made in this case, and which we did not see our way to cure, was that the learned Recorder asked if the notices of convictions had been served on the prisoner, and, being told that they had been served both on him and on the Court, proceeded to pass sentence. There was no question that the prisoner had in fact committed the offences, but he was not formally asked if he admitted the convictions and, as the section contemplates that before the sentence of corrective training is passed the prisoner should be asked if he admits the previous convictions, we felt that the sentence of corrective training could not stand, and for that reason we imposed a sentence of imprisonment instead.

It is desirable that it should be remembered by all Courts, both of assizes and quarter sessions, that before a sentence of corrective training or of preventive detention is passed, the convicted person is to be asked whether he admits the convictions of which notice has been given. If he says yes, no

more need be done. If he says that he does not admit them, then the question whether he is the person who was previously convicted has to be decided by a jury.

Another point arose in this case, and we stood the matter over in case counsel desired to look into the matter more closely. By section 22 it is provided: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section", and the provisions of the section are that he has to give his name and address to an appointed society so that they can keep watch on him. The section says "Where a person is convicted on indictment", but when we turn to a later section in the Act, section 29, we find that a new system has been introduced into criminal procedure under which, if magistrates deal with a case summarily and convict a prisoner, and then on hearing his character and previous record think that it is a case in which a more severe sentence than they have power to inflict must be passed, they can send him forward to be dealt with by the appeals committee of quarter sessions.

Under section 29, subsection (3), it is provided: "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment". In the opinion of the Court, it is intended that, where a prisoner is sent forward

1949.
June 21,
July 15.

DENNIS
BROWES.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
June 21,
July 15.

DENNIS
BROWES

Goddard
L.C.J.,
Oliver, J.
Stable, J

for sentence to quarter sessions, although he has not been convicted on indictment, he is for all purposes to be treated as though he had been convicted on indictment. He has in fact been convicted by the magistrates and sent forward to be dealt with by quarter sessions, and it is important that that should be remembered because once he has been sent forward for sentence to the sessions he can appeal against his sentence to this Court. If he was not in the same position as a person convicted on indictment, he would not be able to appeal to this Court. Although he has been convicted by the magistrates, he can appeal to this Court not against conviction but against sentence.

The Court has no doubt that the intention of the Act is that once a person is sent forward to quarter sessions for sentence he is to be treated for all purposes as though he had been convicted on indictment. In the present case, however, as the provisions of section 23 were not complied with and the sentence of corrective training was set aside, the applicant cannot be ordered to report in accordance with section 22.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER AND
MR. JUSTICE STABLE.

ABRAHAM BARNETT KRITZ.

1949.
July 18.

Summing-up — False Pretences — Intent to Defraud — Believed Ability to Repay.

The appellant obtained from a bank £72,000 by drawing against uncleared accommodation cheques which were of no value. He falsely represented to the manager that he was engaged in whisky transactions on a large scale, and that the cheques were the proceeds of those transactions. At the trial the appellant's evidence was that the bank manager was "in the business from the start" with him, and it was contended on the appellant's behalf that there was no intent to defraud because the cheques named in the indictment had been paid into a bank on which some worthless cheques had been drawn, and those cheques had, accordingly, been met. It was conceded by the prosecution that the bank was not injured by the act of the appellant in obtaining the particular £72,000. In directing the jury on intent to defraud, the Judge said: "If a false statement, false to the knowledge of the person making it, is made and by this means money . . . is obtained . . . the fact that the man may, and undoubtedly would if he got the chance, repay the money is . . . immaterial. . . . It is immaterial what he intended to do with the money if he obtained it by means of pretences that are false, with intent to defraud".

Held, that the direction conformed with the direction given by Channell, J., in *CARPENTER* (1911), 22 Cox C. C. 618, which, in the opinion of the Court, was the *locus classicus* on intent to defraud, and was therefore, entirely satisfactory.

PICKUP (1931), 22 Cr. App. R. 186, distinguished.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on March 22, 1949, of obtaining money by false pretences, and was sentenced by the Common Serjeant to four years' penal servitude.

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

The appellant was charged with obtaining four sums of money totalling £72,000 by false pretences from the Midland Bank on December 11 and 12, 1946. In order to obtain finance from the bank, the appellant habitually paid into his account worthless cheques which he knew to be drawn on the accounts of persons of no substance. He represented to the manager that he was engaged in whisky transactions on a large scale and that these cheques represented the proceeds of those transactions. By so doing he was enabled to obtain cash for the full face value of the cheques before they were cleared. He paid some of the cash which he had so obtained into the accounts of the drawers of the worthless cheques so as to enable the cheques to be met.

Immediately before December 11, 1946, cheques totalling £93,800 were in the course of collection by the bank, and the bank had paid the appellant that amount on those cheques. On December 11 and 12, 1946, the appellant paid further worthless cheques into the bank and received in exchange £93,447. That sum included the four sums which were the subject-matter of the indictment. On December 11 and 12, 1946, the appellant paid the whole of the £93,447, together with certain moneys of his own, into the accounts of the drawers of the cheques for £93,447, to enable those cheques to be met, as in fact they were. He also paid certain cash into his own account with the bank. The bank was, in the result, in a slightly more favourable position after he had obtained the sums which formed the subject-matter of the indictment and used them in the manner described than it was before December 11, 1946.

The appellant, in his evidence, denied making the alleged representations about whisky transactions to the bank manager and said that the bank manager was "in the business from the start" and knew that the cheques were worthless. He further said that he did not intend to defraud the bank; that he always intended to use, and did use, the £72,000 for the purpose of enabling some of the outstanding cheques to be met; and that, accordingly, the bank was in no way injured

by advancing him the £72,000. The prosecution conceded that the bank was not injured by the act of the appellant in obtaining this particular £72,000.

The summing-up of the Common Serjeant on the issue of intent to defraud is summarised in the headnote, and set out fully in the judgment.

H. C. Leon, for the appellant.

Christmas Humphreys and *J. S. Bass*, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Common Serjeant of fraud on the Midland Bank involving very many thousands of pounds. The bank were the losers of something like £70,000, although the defendant protested that the loss was about £52,000.

The way in which the fraud was worked on the bank was this: The appellant, who apparently carried on the business of a bookmaker, wanted to carry on some other businesses or obtain finance at the expense of the bank, and he proceeded to embark on a series of transactions in which there is nothing very novel except the skill with which he did it. It was an elaborate system of "kite flying"—I use the slang expression because it is very well known—that is to say, dealing with what are sometimes more forensically called accommodation cheques. He got hold of a certain number of people, all people of straw, who had a couple of pounds or something like that in a bank, but had cheque books. He persuaded them to write cheques for sums of money which, I suppose, in their wildest dreams they never expected to own. Against these perfectly worthless documents, which he paid into the bank, he managed to persuade the bank to let him draw.

Drawing against uncleared cheques is one of the oldest forms of fraud. Generally, bank managers are too much on their guard to let it go on, but in this case by means of specious lies which the appellant told the bank manager, and by reason of the bank manager not having that degree of suspicion which bank managers ought to have, the appellant managed to

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard.
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

defraud the bank to a very considerable extent. Of course the debit balance got larger and larger. The appellant represented to the bank manager that he was carrying on enormous deals in whisky. He was not doing so, but he took the manager down to see the whisky with which he was supposed to be dealing and showed him a number of cases. He said that the manager was willing to allow him to get this extraordinary amount because he promised the manager a case of whisky. One case of whisky to cost £70,000 would seem to me, even at present prices, very extravagant, but so the matter went on, and when finally it came to an end the bank were by that time the losers to the extent of something like £70,000. The whole of the foundation of this audacious and scandalous fraud was that the appellant was representing that he was a *bona fide* dealer in whisky.

The only value of this case has been to give rise to a discussion on the meaning of the words "intent to defraud". Mr. Leon in his powerful argument has called our attention to a large number of cases, and has contended that the question of intent to defraud was withdrawn from the jury. The learned Common Serjeant directed the jury: "This is the ruling that I must give you in law, because the law is my province. If a false statement, false to the knowledge of the person making it is made, and by this means money or credit is obtained, and the person who gives that money or credit does so in reliance on the false statements that have been made—well, that is sufficient and you need not go any further. The fact that the man may, and undoubtedly would if he got the chance, repay the money is, to my mind, quite immaterial, if, in fact, it can be said in this case that he even did repay the money, because we know of the net results of all this unfortunate business, and that the bank has lost something between—well, take the accused man's figure if you like, £58,000—between £58,000 and £80,000; but it is immaterial what he intended to do with the money if he obtained it by means of pretences that are false, with intent to defraud. And to defraud, as I

say, means by deceit to get other people to take a certain course of action that is harmful to them ”.

Before I deal further with that passage in the summing-up, I ought to say that the point which was very much impressed upon us was this : The two cheques which formed the substance of the indictment were cheques which were obtained on a certain day, and, it was said, the defendant intended to pay, and did pay, into another bank funds to meet them, and it was said he paid in some other money as well. No doubt that was good news for the bank, but it does not seem to have made much difference. Of course, it was an essential part of the snowball that he should pay in money from time to time, because if he did not the bank would have come down at a much earlier time and stopped this course of business. By meeting those cheques he was not paying back to the bank the money which he had borrowed that day ; he was simply paying money to enable those cheques to be cashed, so that they would go in reduction pro tanto of the whole overdraft. Of course, if money cannot be paid in from time to time, the whole thing must come to an end.

I have read the principal direction which the Common Serjeant gave on this matter. It is said that he was wrong because, it is contended, it was still left open to the defendant to satisfy the jury, if he could, that there was no intent to defraud. He endeavoured to satisfy the jury that there was no intent to defraud mainly by saying “ the bank manager was in this business from the start. He knew all about it. He knew I had no whisky ”. The bank manager denied that, and there is no ground for saying that the jury did not accept his denial, because the Common Serjeant told them that if they thought the bank manager was in this business, to use a neutral expression, then of course there was no case at all, and there was no intent to defraud.

This Court desires to lay down in the clearest possible terms that they approve of the judgment of Channell, J., in *CARPENTER* (1911), 22 Cox C. C. 618, at p. 624. This is the *locus classicus* on this point. It was a case that arose out of

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 13.

ABRAHAM
BARNETT
KEITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

the failure of the Charing Cross Bank, and the learned Judge told counsel of and got their assent to the direction which he was going to give. It is not unimportant to observe that the learned counsel were Sir John Simon, Solicitor-General, for the Crown, and Sir Henry Dickens, K.C., afterwards Common Serjeant of the City of London, for the defendants. The learned Judge said this: "If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money, because you may by fraud get hold of money, even if you mean to repay it, and thoroughly believe that you can repay it—you are still defrauding the depositor". Now mark the next passage: "You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this: whether or not the statements were honestly made".

That is a statement of the law, by one of the most eminent Judges before whom I ever had the good fortune to practise. It has been universally regarded by Judges and by counsel as the *locus classicus* on the point.

Those words were expressly repeated to a jury by Avory, J., in the case of *PARKER AND BULTEEL* (1916), 25 Cox C. C. 159. The learned Judge in that case read to the jury the charge of Channell, J., and told them that was the law on the subject.

Mr. Leon's industry has discovered some later cases in the *Criminal Appeal Reports*, which, he says, are in conflict with that decision. Whatever rule of law may be laid down, or whatever guide may be given to a jury in a case, there must always be, human affairs being what they are, some exceptional cases in which the general rule that is laid down may not be wholly applicable. It is impossible to direct a jury or to lay down in a judgment, by means of particular words or by using particular expressions, a rule which is to be universally applied without regard to the particular facts of each case. That is illustrated in the case on which Mr. Leon most relied, *PICKUP* (1931), 22 Cr. App. R. 186. That was a case in which a man had a car on hire-purchase terms on which he was owing about £150. Having still about £70 to pay, he sold the car for £150 and another car which he was going to take in part exchange. Then, having got that £150, he proceeded to pay off the arrears and to make arrangements with the hire-purchase company for the future payments to be made; and it was found that after he had received the £150 and before he received the car from the prosecutor, that is to say, while the matter was still in a state of negotiation or it was not a completed transaction, "the appellant paid off all arrears due to the Ebor Trading Company and later paid other sums in discharge of his debt to them, and before the police court hearing Mr. Nutter agreed to accept certain property of the appellant in discharge of the liabilities which had been transferred to him by the Ebor Trading Company". The learned Recorder in that case told the jury that as the defendant had said that the car was his there was an end of the case, and they need not consider anything else. That just shows what I have already said, that there may often be cases which on their particular facts cannot be brought and ought not to be brought within the general principles laid down by the Judges from time to time on some particular matter. It was perfectly possible in *PICKUP's CASE* (*supra*) that the defendant may have been and probably was an honest man. Many people think, or at least a person may be excused for thinking, that it would not be

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

wrong to say with regard to a car which he is buying on hire-purchase and on which he has already paid a substantial sum : “ This is my car, and I will sell it to you ”. The sort of question which has to be left to the jury in such circumstances is : Was the defendant honest ? That is really only an application of what Channell, J., said in the judgment I have just read, “ the question as to the intent to defraud substantially comes to this : Whether or not the statements were honestly made ”.

The reason why the Court quashed the conviction in PICKUP’S CASE (*supra*) was because the Recorder had withdrawn from the jury any chance of their saying that the statements were honestly made in the circumstances of that case, but in the present case how could that issue have been possibly left to the jury ? The appellant’s defence was that the bank manager was in this all the time. It is true that he said “ I had no intent to defraud ”, and bolstered that up by saying “ I was going to pay the money to the bank ”. That was not the point. The point was that this was not an isolated transaction such as in PICKUP (*supra*) or HUNT (1918), 13 Cr. App. R. 155, which depended on the dialogue which took place between the learned Judge and the foreman of the jury when the charge was given. This was one of a series of transactions all of which had one common object, to defraud the bank.

Therefore, in our opinion, there is nothing in the point that the Common Serjeant did not leave properly to the jury the question of intent to defraud, and in our opinion he did not give any wrong direction. I repeat that this Court has not the least intention of departing from the classical judgment on this question, and we do not hesitate to say that the judgment in CARPENTER (*supra*) is a correct statement of the law. We say that in order that there may be no further doubt in anybody’s mind what is the law with regard to intent to defraud or what is the direction which should be given to a jury.

That really is the main point in this case. The only other point which has been seriously argued is that because the

learned Common Serjeant told the jury that they must be reasonably satisfied, and did not use the words "satisfied beyond reasonable doubt", he was not stating sufficiently the onus of proof. It would be a great misfortune, in criminal cases especially, if the accuracy or inaccuracy of a summing-up were to depend upon whether or not the Judge or the Chairman had used a particular formula of words. It is not the particular formula of words that matters; it is the effect of the summing-up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the learned Judge uses one form of language or whether he uses another is neither here nor there.

In our opinion, there was a perfectly fair and a perfectly proper summing-up by the learned Common Serjeant in this case. We do not think that any jury could have been left in any doubt as to what was their duty. Juries, in my humble opinion, are not such fools as they are very often thought to be. They know when they have been a short time in the jury box that it is the duty of the prosecution to prove the case and that they have to be fully and thoroughly satisfied, and they very seldom want guidance on that point. It is right that they should have it. It is right that they should be reminded that the onus is on the prosecution all the way through the case. It is right that they should be reminded in a criminal case that they must be fully satisfied of the guilt of the accused person and should not find a verdict against him unless they feel sure. That is the direction which I myself constantly give to juries when I am at assizes or at the Old Bailey. When once a Judge begins to use the words "reasonable doubt" and tries to explain what is a reasonable doubt and what is not, he is much more likely to confuse them than if he tells them in plain language: "It is the duty of the prosecution to satisfy you of the man's guilt". I am not saying that the learned Common Serjeant used that formula

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 13.

ABRAHAM
BARNETT
KRITZ.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

of words, nor am I saying that it is to be preferred before all others, but what I do say is, and I am sure I can say it with the full assent of my brethren, that it is not the actual formula used that matters, but the effect of the summing-up, and if the effect of the summing-up is to convey to the jury what is their duty, that is enough.

On the other part of the case, the complaints with regard to the lack of this point and that point in the summing-up, there is nothing we need say. We do not find that there is anything substantial missed from the summing-up which could really have affected the minds of the jury. The simple question was whether or not they believed the story of the bank manager or whether they believed the defendant's defence, which was that the bank manager was a party to these transactions.

For these reasons, in the opinion of the Court, there is nothing in the appeal, and it is dismissed.

Appeal dismissed.

Solicitors: Sylvester, Amiel & Co., for the appellant; Solicitor to Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER AND
MR. JUSTICE STABLE

WALTER JOSEPH FAIRBAIRN.

1949.

July 14.

Evidence—Suspected Person Loitering with Intent—Previous Conviction—Evidence Admitted to Prove Defendant a Suspected Person—Firearms Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 12), s. 23 (2)—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 15.

The appellant was convicted of being in unlawful possession of a firearm, contrary to s. 23 (2) of the Firearms Act, 1937, at the time of his apprehension for an offence specified in the Third Schedule to the Act, namely, the offence of being a suspected person loitering with intent to commit a felony, contrary to s. 4 of the Vagrancy Act, 1824. In order to prove that the appellant came within the category of a suspected person, evidence of a previous conviction of the appellant was admitted by the Judge at the trial.

Held, that the evidence was properly admitted.

LEDWITH v. ROBERTS, [1937] 1 K. B. 232, considered.

Appeal against conviction.

The appellant was convicted at Leeds Assizes on March 23, 1949, of being in unlawful possession of a firearm at the time of his apprehension for an offence specified in the Third Schedule to the Firearms Act, 1937, namely, the offence of being a suspected person loitering with intent to commit a felony, and was sentenced by Streatfeild, J., to twelve months' imprisonment.

Evidence was given by police officers that they saw the appellant and two other men looking into motor cars and trying the doors. The men ran away, and police chased the appellant and arrested him, and on his arrest he was found to be in possession of a revolver. With a view to proving that the appellant came within the category of a suspected person, the Judge admitted evidence of a previous conviction of the appellant.

1949.
July 14.

WALTER
JOSEPH
FAIRBAIRN.

Goddard.
L.C.J.,
Oliver, J.,
Stable, J.

Maxwell Gosnay, for the appellant :

The evidence of the appellant's previous conviction was inadmissible. The Judge admitted it for the purpose of showing that the appellant came within the category of a suspected person. Under section 15 of the Prevention of Crimes Act, 1871, it could have been admitted on a different issue only, namely, for the purpose of proving intent to commit a felony. The question of what must be proved to bring a person within the category of a suspected person was exhaustively reviewed by the Court of Appeal in *LEDWITH v. ROBERTS*, [1927] 1 K. B. 532, and it was thereby established that the conduct of the person accused on previous occasions was admissible, but the Court did not hold that a previous conviction might be proved for that purpose.

H. R. B. Shepherd, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE : This case was originally put into the list as an application, but the Court, when it saw the papers, thought the appeal was really on a question of law, and therefore, without considering the matter of the application for leave to appeal, ordered that it should be treated as an appeal, and accordingly it has been put in the list as an appeal.

Notwithstanding the painstaking and able argument of *Mr. Gosnay*, the Court is of opinion that the conviction was perfectly right and that there was no misdirection by the learned Judge. The appellant was charged before *Streatfeild, J.*, with an offence under the Firearms Act, 1937. By section 23 (2) of that Act it is provided : " If any person, at the time of his committing, or at the time of his apprehension for, any offence specified in the Third Schedule to this Act, has in his possession any firearm . . . he shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence under this subsection . . . ". One of the offences in the Schedule is an offence " under such of the provisions of section 4 of the Vagrancy Act, 1824, as are referred to in, and

amended by, section 15 of the Prevention of Crimes Act, 1871, and section 7 of the Penal Servitude Act, 1891 ”.

Section 4 of the Vagrancy Act provides : “ Every suspected person or reputed thief frequenting any . . . street, or any highway, or any place adjacent to a street or highway, with intent to commit a felony ” is guilty of an offence. By section 15 of the Prevention of Crimes Act, 1871, it is provided “ that in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved . . . it appears . . . that his intent was to commit a felony ”. Under the words of that section strictly construed it would appear that the character of the defendant can be proved, and therefore previous convictions can be proved, on the question whether he intended to commit a felony.

Since that section was passed, the question what it is necessary to prove before a person can be convicted of being a suspected person has been the subject of a great many cases, the leading case being *LEDWITH v. ROBERTS*, [1937] 1 K. B. 232. *LEDWITH v. ROBERTS* (*supra*) was a case in which police officers observed two men, who had no previous convictions and who had not up to that time been suspected of any particular crime, acting in a manner which made the police at that time think that they were up to no good, if I may put it in that way. They arrested them without warrant as suspected persons, and the Court of Appeal held that the mere suspicion at the time, owing to one particular act which the men were doing, was not enough to put them into the category of suspected persons. There must be antecedent acts, but those antecedent acts may have occurred on the same day as the arrest, as was the case for instance in *HARTLEY v. ELLNOR* (1917), 117 L. T. 304, in which the police had watched two suspected pickpockets for a very long time. They had been keeping them under careful observation for a considerable period at omnibus stops and had watched them going up and

1949.
July 14.

WALTER
JOSEPH
FAIRBAIRN.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 14.

WALTER
JOSEPH
FAIRBAIRN.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

down touching people's pockets. After this had been observed for a very considerable time they arrested them, and it is now, I think, well established by other decisions that *LEDWITH v. ROBERTS* (*supra*) must not be taken as throwing any doubt on the correctness of the decision in *HARTLEY v. ELLNOR* (*supra*).

When one comes to read *LEDWITH v. ROBERTS* (*supra*) carefully, one finds it lays down that before the arrest the conduct or character of the persons arrested must be such that they come fairly within the category of being suspected persons. If people who have been previously convicted are found loitering in the streets and their conduct is such as to give rise to proper and reasonable suspicion that they are there for the intention of committing a felony, they commit an offence under the Vagrancy Act and can be dealt with as suspected persons loitering with intent to commit a felony. It is perfectly clear from the judgments in *LEDWITH v. ROBERTS* (*supra*) that, had the police in that case been able to show that the two men whom they arrested had been previously convicted, the arrest would without doubt have been justified. It was just because the police could give no evidence of antecedent acts or antecedent character that the Court of Appeal held that it was impossible to say that the persons in question came within the category of suspected persons. Scott, L.J., in the course of a very comprehensive and full judgment, said (on p. 264): "There was some discussion before us on the meaning of the phrase 'suspected person' in section 4, it being contended, as I understood, that it covered not only the case of a person who had already become on his previous record reasonably suspected by the police so as to bring him into a definite and quasi-objective category—on the analogy of the phrase 'reputed thief'—but also a case where on the very occasion of arrest the arresting constable observes the person doing something which arouses his suspicion". The learned Lord Justice in that case obviously had in mind the fact that it would be possible to prove that a person was a suspected person by proving his previous record and character, and, as a matter of commonsense, that must be so. If a man is found

loitering in the street acting in a suspicious manner, and it is established that he has half-a-dozen previous convictions, obviously he can rightly be regarded as a suspected person by reason of his previous convictions. His previous convictions supply evidence of his intention to commit a felony.

In the present case the evidence of the police officers was that they saw the appellant and two other people whom they knew to be suspected persons, and the reason why the police knew the appellant to be a suspected person was because he had been previously convicted. Therefore, he came within the category of a suspected person. But that would not of itself be enough. A man with previous convictions for dishonesty cannot be arrested merely because he is walking down a street. That, of course, would be absurd. It has to be shown that a man with a bad character, and known to the police as a person with a bad character, is acting in such a way as to justify an arrest. There was ample evidence in this case, if the jury accepted it, for that purpose, because the evidence of the police officers was that they had seen the men peering in motor cars and trying the doors; in other words, seeing if they could find a motor car with an open door. It would be a reasonable inference that if they found such a car they intended to take the car and drive it away, or, if not, lay their hands on any portable property in the car. That is why they were arrested.

It is perfectly true that the learned Judge in charging the jury in this case said: "Members of the jury, the question of being a suspected person is one of a status a man has acquired; the unenviable status of being a suspected person. For that purpose, and for that purpose only, as I explained to you before, the prosecution have given evidence before you that on the 17th June of last year he was convicted and sentenced to six months' imprisonment on a charge of taking away a motor car without the consent of the owner". At first sight, it appears that the learned Judge might have been guilty of an inaccuracy there because the Prevention of Crimes Act deals with the admissibility of previous convictions for the purpose

1949.
July 14.

WALTER
JOSEPH
FAIRBAIRN.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 14.

WALTER
JOSEPH
FAIRBAIRN.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

of proving intent—that is, intent to commit a felony—but in the opinion of the Court it is perfectly clear that, quite apart from that section of the Prevention of Crimes Act, and dealing only with section 4 of the Vagrancy Act, in order to show that a person is a suspected person, we now know from *LEDWITH v. ROBERTS* (*supra*) that a person must be in that category before the suspicion which caused him to be arrested. It is obvious that the prosecution must be able to prove his previous convictions to show that he was a suspected person. It is the previous convictions that make him a suspected person and previous convictions can always be proved if they are relevant to the charge before the Court.

The reason why evidence of previous convictions is not allowed to be given in an ordinary case is because they are not considered relevant. If the charge against a man is that of breaking and entering a house on January 1, 1949, it is not relevant to that charge that he was convicted of breaking and entering a house on January 1, 1948. It only goes to show that he is a person likely to commit an offence, but not that he had committed that offence. But when one finds that the Act of 1824, which has now been on the statute-book for 125 years, has been authoritatively expounded by the Court of Appeal, and it is accordingly necessary to bring a person within the category of a suspected person before the suspicion which gave rise to the arrest, there is no better evidence that he comes within that category than by proving he has one or more previous convictions.

In these circumstances the Court is of opinion that the charge given by the learned Judge to the jury in this case was perfectly right and the appeal is dismissed. Perhaps the learned Judge, we may say, did, in giving his charge to the jury, confine it within too narrow a limit. In other words, his charge was rather more favourable to the prisoner than it need have been, because in the opinion of the Court the evidence of a previous conviction which can be given by the Prevention of Crimes Act, 1871, be given as evidence of intent is now, as a result

of the decision in *LEDWITH v. ROBERTS* (*supra*), clearly also admissible to bring him within the category of a suspected person.

Appeal dismissed.

Solicitor: T. A. Radley, Leeds, for the Crown.

1949.
July 14.

WALTER
JOSEPH
FAIRBAIRN.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

BEFORE

MR. JUSTICE OLIVER, MR. JUSTICE STABLE AND
MR. JUSTICE BIRKETT.

RONALD WILLIAM FRANK MARSH.

*Evidence—Carnal Knowledge of Child—Corroboration—Previous
Conviction of Indecent Assault on Same Child—Admissibility.*

1949.
July 18.

The appellant was charged with carnal knowledge of a child eight years old. Evidence for the prosecution was admitted that eighteen months previously the appellant had confessed to, pleaded guilty to, and been sentenced for, an indecent assault on the same child.

Held, that the evidence was properly admitted.

BALL, 6 Cr. App. R. 31; [1911] A. C. 47, followed.

Appeal against conviction.

The appellant was convicted at Somerset Assizes on June 2, 1949, of carnal knowledge of a child of eight and was sentenced by the Lord Chief Justice to four years' imprisonment.

The child was the daughter of the appellant's wife by another man. On May 7 at about 6 p.m. she went some hundreds of yards from her house into a field and picked some cowslips. Abutting on the field was a shed in which the appellant kept a motor car and, according to the child, the appellant was there at the time when she was picking the flowers. She

1949.
July 18.

RONALD
WILLIAM
FRANK
MARSH

Oliver, J.,
Stable, J.,
Birkett, J.

said that he called her into the shed and committed the offence. She stated that he did not hurt her. When she went back with the flowers to her mother's house, her mother thought her manner very strange. She was examined next day by a doctor, who found that she had quite recently been interfered with and that there had been some degree of penetration. Evidence was given by the prosecution that eighteen months before, at a time when the appellant, the child and her mother had been living in the same house, the appellant had confessed to, pleaded guilty to, and been sentenced for an indecent assault on the same child. The appellant's defence was an *alibi*, which was supported by various members of his family in varying degrees.

W. M. Huntley, for the appellant :

Even if the evidence relating to the previous conviction was strictly admissible in law—and on the authorities it would be difficult to contend that it was not—the Judge should in his discretion have excluded it as being of small probative value, though highly prejudicial to the fair trial of the appellant. Apart from this, there was no corroboration of the child's evidence. The child's evidence required to be scrutinised with particular care, because of her statement that the appellant did not hurt her, as, if what the child deposed to had taken place, it was inconceivable that she would not have been hurt. The summing-up did not refer to the possibility of the jury convicting of an attempt only or of indecent assault, both of which verdicts were open to them on the indictment.

N. J. Skelhorn, for the Crown :

On the authority of *BALL*, 6 Cr. App. R. 31; [1911] A. C. 47, the evidence of the indecent assault was clearly admissible to prove the existence of a guilty passion. *SHELLAKER*, 9 Cr. App. R. 240; [1914] 1 K. B. 414, and *HEWITT* (1925), 19 Cr. App. R. 64, are authorities to the same effect. It was entirely within the Judge's discretion whether he allowed the evidence to be given, and the jury may well have considered its probative value to be very strong.

OLIVER, J. : This is an appeal against conviction of carnal knowledge of a child of eight before the Lord Chief Justice at the Somerset Assizes held at Wells. The appellant was sentenced to four years' imprisonment. [His Lordship stated the facts as set out above and continued:] The evidence of the child, which was not taken on oath, required corroboration by statute. There was put forward as evidence of corroboration that eighteen months before, at a time when the appellant, the child and her mother had last been living together in the same house, the appellant had confessed, pleaded guilty to, and been sentenced for, indecently assaulting this same child, who was then only six.

It has been urged by Mr. Huntley first that that evidence was inadmissible in law. Later he conceded that on the authorities it was admissible, but contended that it had such small probative value that it ought not to have been admitted under that rule, which has been called by some Judges the rule of prudence and discretion. It was eminently a matter for the discretion of the Judge. The learned Lord Chief Justice treated the evidence as plainly admissible and therefore worthy of the jury's consideration, the degree of probative value being left to them.

There is no question that the evidence was admissible. Various cases, including SHELLAKER, 9 Cr. App. R. 240; [1914] 1 K. B. 414, and HEWITT (1925), 19 Cr. App. R. 64, have been cited, but we think that the real principle was laid down in BALL, 6 Cr. App. R. 31; [1911] A. C. 47, which was cited by Mr. Skelhorn during the argument on admissibility. That was a case of incest between a brother and sister, and the way in which the principle was expressed there was that the evidence was admissible as tending to prove a guilty passion. Mr. Huntley argued that in this case there was no question of a guilty passion on the same lines as in BALL (*supra*), but it was admitted by the Lord Chief Justice for the purpose of showing a guilty lust. The child had gone out to pick flowers and must have been quite close to the shed where the appellant was.

1949.
July 18.

RONALD
WILLIAM
FRANK
MARSH.

Oliver, J.,
Stable, J.,
Birkett, J.

1949.
July 18.

RONALD
WILLIAM
FRANK
MARSH.

Oliver, J.,
Stable, J.,
Birkett, J.

When she came back, someone had interfered with her private parts in such a manner as to injure her, and there was no opportunity of this injury having been inflicted by anyone except the appellant. In the view of the Court, the fact that the appellant had previously confessed to, and had been convicted of, indecently assaulting that same child might have very strong probative value. Its actual value on the facts of the case was for the jury. No complaint is made of the direction in the summing-up on that matter, and the jury evidently thought that it had strong probative value. In our opinion, there is nothing more to be said about that matter.

Then it is contended that the child said that she was not hurt and the doctor said that she must have been hurt if that damage was done to her. I do not know where that leads. Someone had hurt the child, and how is it possible to argue that it could not be the appellant merely because the child says that she was not hurt? No doubt the jury thought that that statement must be attributed to the somewhat nebulous memory of a little child.

The next complaint was that there was no specific direction on the part of the Lord Chief Justice that the jury could have found the appellant guilty of the lesser offences of an attempt to have carnal knowledge or an indecent assault. In our view, the way in which the matter was left gave the appellant a very much better chance of being acquitted than if the other offences had been mentioned. If the jury had thought that the offence charged had not been committed, they would have said so, and the appellant would have been acquitted without the jury being invited to consider the lesser charges.

With regard to the general allegation that the verdict ought not to be supported having regard to the evidence, the Court thinks that there is nothing whatever in it. The Court is of opinion that the case was satisfactorily proved and that there is no reason whatever to interfere with the result. This appeal is, therefore, dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER AND
MR. JUSTICE STABLE.

FRANK NEAL.

1949.
July 14, 25.

Jury—Retirement to Consider Verdict—Departure from Court Building by Leave of Judge—Irregularity Going to Root of Conviction—No Power to Order Venire de Novo—Conviction Quashed—Duty of Counsel to Call Attention of Court to Irregularity.

After a jury had retired to consider their verdict and had been given into the charge of the bailiff, they sent a message to the Recorder asking if they might be allowed to leave the Court for the purpose of getting luncheon during the midday adjournment. The Recorder gave them permission to do so, and they afterwards returned and gave their verdict.

Held, that the irregularity was one which constituted a departure from the established rules of criminal procedure and which rendered the trial abortive.

KETTERIDGE, 11 Cr. App. R. 54; [1915] 1 K. B. 467, applied.

Held, further, that the Court was obliged to quash the conviction and could not order a *venire de novo*, as the trial had been regular up to the moment when the jury were allowed to disperse and could not be treated as having been a nullity.

CRANE, 15 Cr. App. R. 183; [1921] 2 A. C. 299, considered.

If an irregularity in the course of a trial comes to the knowledge of counsel before the verdict is returned, it is duty of counsel to bring the irregularity to the attention of the Court at the earliest possible moment, so that the presiding Judge may consider whether or not to discharge the jury without giving a verdict.

STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr. App. R. 40, at p. 56; [1944] A. C. 315, at p. 328) considered.

Appeal against conviction.

The appellant was convicted at Nottingham City Quarter Sessions on April 7, 1949, of fraudulent conversion, and was sentenced by the Recorder to twenty months' imprisonment.

1949.
July 14, 25.

FRANK NEAL

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

On the conclusion of the summing-up the jury were given into the charge of the bailiff and retired to consider their verdict. After they had been absent from Court for about half an hour a message was sent to the Recorder asking if the jury might have lunch together during the midday adjournment and leave the building for that purpose. The Recorder, after referring to *Archbold's Criminal Pleading, etc.*, 31st ed., p. 194, gave them permission to do so. The jury returned to Court after the adjournment and delivered their verdict. Defending counsel then said to the Recorder: "I understand that they did disperse—I do not know what the period was—for the luncheon interval". The Recorder then heard evidence of character and passed sentence.

Denis H. Cowley, for the appellant:

A trial Judge has no power in law to permit a jury to separate after the charge has been delivered and thereafter the jury must remain in the custody of the bailiff until after they have delivered their verdict without holding communication with any person: *O'CONNELL AND OTHERS* (1844), 1 Cox C. C. 410. In the present case the jury were allowed to separate and go for lunch by permission of the Recorder after they had been given in charge and had retired to consider their verdict. Accordingly, the conviction was invalidated. The passage in *Archbold's Criminal Pleading and Practice*, 31st ed., p. 194, to the effect that the jury may separate after retirement with leave of the Court is unsupported by the authorities, save that such leave can be given in cases of urgent necessity. *KETTERIDGE*, 11 Cr. App. R. 54; [1915] 1 K. B. 467, is an authority for the quashing of a conviction where a jury had separated, though it is to be distinguished from the present case in that the separation there was due to the act of a single jurymen without any leave from the Court being given, whereas in the present case the separation was brought about by the act of the Recorder, who misdirected himself as to his powers under the law.

The words in *KETTERIDGE* (11 Cr. App. R., at p. 57;

[1915] 1 K. B., at p. 471), "it is, of course, open to the Crown to recommence the proceedings", are *obiter* and, furthermore, are not applicable in this case. If in this case further proceedings were brought on the charges before the Court, the appellant could successfully establish the plea of *autrefois acquit* or *convict*. There is no power in the Court to grant a *venire de novo*. This cannot be awarded after a verdict upon a charge of felony. There were counts of felony in the indictment in this case. "When the jury have once found a verdict of conviction or acquittal the matter has become *res judicata* and after that there can be no further trial": MURPHY (1869), L. R. 2 P. C. 536, at p. 548. *Venire de novo* can be awarded only after a verdict in a case where the trial was a nullity from the outset, so that the verdict of the jury was in fact no verdict and the accused at no time stood in peril. In the present case there was a good indictment, evidence was properly given and received and a verdict given, and the trial was in all respects a proper trial save for the error with regard to the separation of the jury.

Nigel Robinson, for the Crown:

The conviction here was for misdemeanour, and the procedure is less stringent on a trial for misdemeanour than on a trial for felony: HALES, 17 Cr. App. R. 193; [1924] 1 K. B. 602. CHARLESWORTH (1860), 1 B. & S. 460, may be regarded as an authority for the proposition that the Recorder had a discretion whether to permit the jury to separate or not.

Cur. adv. vult.

At the conclusion of the arguments the Lord Chief Justice said that the appeal would be allowed and the conviction quashed, and that the Court would give their reasons at a later date.

July 25.—The following judgment of the Court was read by THE LORD CHIEF JUSTICE: The Court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

1949.
July 14, 25.
FRANK NEAL.
Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

The prisoner was charged before the Recorder of Nottingham on an indictment containing twenty-six counts, two of which were withdrawn from the jury. Of the remaining counts some were for larceny of moneys and others for fraudulent conversion. The jury acquitted on all charges of larceny and convicted on eight charges of the misdemeanour of fraudulent conversion. The appeal is brought not on any ground of misdirection or misreception of evidence, and in fact the merits of the case do not enter into consideration at all, but it appears that after the summing-up was concluded and the jury given in charge of the bailiff they sent a message to the learned Recorder asking that they might be allowed to leave the Court for the purpose of getting luncheon, and the learned Recorder has reported to the Court that what in fact happened was that after the jury had been absent for about half an hour a message was sent asking if the jury might have lunch together during the midday adjournment and leave the Court for that purpose. He gave them permission to do so after referring to *Archbold's Criminal Pleading, etc.*, 31st ed., p. 194, where it is stated that the jury must not leave the place appointed for their deliberations after they have retired without the special permission of the Court. He appears to have treated that as saying that he could give them permission to leave the Court, and accordingly he did so. After the jury had given their verdict, Mr. Cowley, who appeared for the prisoner, mentioned the matter to the Recorder, who said: "I understand they did disperse, I do not know what the period was, for the luncheon interval". The Recorder then heard evidence of character and proceeded to judgment. The point that is now taken on behalf of the prisoner is that allowing the jury to leave the Court after they had retired to consider their verdict was an irregularity which was contrary to law, and that consequently the conviction must be quashed.

Now there is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leaves the Court no option but to quash the conviction: *per* Lord Sumner in *CRANE*

v. DIRECTOR OF PUBLIC PROSECUTIONS (15 Cr. App. R. 188, at p. 216; [1921] 2 A. C. 299, at p. 381), and the question is whether or not this was an essential departure from well-established rules of criminal procedure. Certainly no member of this Court has ever heard of a jury being allowed to leave the building or to depart from the custody of the bailiff once they have been enclosed for the purpose of considering their verdict. In fact, it is well known that to avoid juries being kept locked up without refreshment it is a common practice for the presiding Judge to break off his summing-up, maybe quite near to the end, to allow the jury to obtain their luncheon or other refreshment, and afterwards to complete his charge, and there is no case to be found in the books where a jury once given in charge of the bailiff have been allowed to leave the building for any purpose whatever. It is laid down in *Coke on Littleton*, p. 227b, that a jury must not until they are agreed separate or leave the place appointed for their deliberations, though that must now be read in conjunction with cases which have decided that it is within the discretion of the Court to discharge a jury who are unable to arrive at a verdict. Reference need only be made for this purpose to *WINSOR* (1865), L. R. 1 Q. B. 289, affirmed in the Exchequer Chamber in the same volume at p. 390. *Blackstone*, vol. 4, p. 360 (the edition of 1826 by Joseph Chitty) says "the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict". The matter was considered by this Court in *KETTERIDGE*, 11 Cr. App. R. 54; [1915] 1 K. B. 467. The Court there decided that if a juror, after the Judge has summed up, in any criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the Court, renders the whole proceedings abortive. We can see no reason why, if this is the case where a single juror goes out so as not to be under the control of the Court and is in a position to converse with other persons, it could make any difference if the whole of the jury leave the Court unattended. Indeed, it

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J

would appear to be an *a fortiori* case. It is unnecessary to consider what might be the position if the Court permitted them to go to some place for refreshment under the charge of the bailiff. It may be that in such a case the position would be no different from that which obtained in murder cases until the recent legislation which permits a jury to separate for the night, because it is well known that when the Court rose for the day the jury were taken in the custody of the bailiff or bailiffs to an hotel where they stayed for the night and were brought back in the same custody to the Court the next day. This might still happen if the Court in its discretion refused to allow them to separate.

In truth, the statement in *Archbold* is too wide and should be qualified by some such words as "to be given only in cases of evident necessity". No doubt if a juror is taken ill or wishes to relieve himself the Court can permit the bailiff to take him from the jury room for the purpose of medical attention or of going to the water closet, but he must remain in the charge of the bailiff. If the illness is not a mere passing indisposition, the Judge could no doubt discharge that particular juror as he could if he was taken ill in the box, and under the provisions of the recent statute could take a verdict provided the jury are not reduced below ten. Before that statute, if any one or more of the jury were taken ill and could not continue their deliberations without danger, the duty of the Judge was to discharge the jury without giving a verdict and to order the trial to take place again. This is clear from the judgment of Blackburn, J., in *WINSOR'S CASE* (*supra*). In our opinion, allowing the jury to leave the Court and go into the town after they had been charged, and thereby leaving the custody of the bailiff who had been sworn to keep them in some private and convenient place, is so serious an irregularity and departure from the procedure recognised by law that we have no option but to quash the conviction, as was done in *KETTERIDGE'S CASE* (*supra*).

It may also be observed that section 35 (4) of the Criminal Justice Act, 1948, reinforces the view which we have expressed,

because it is provided by that section that upon the trial of any person for an offence on indictment the Court may, if it thinks fit, at any time before the jury consider their verdict, permit them to separate. It may be said in this case that there was no evidence before the Court that the jury did separate. They had asked if they might leave and have luncheon together, but whether they sat at one table or more than one, whether they went to the same place for luncheon or to different ones, they ceased to be under the control of the Court and were out of the custody of the bailiff, and that, in our opinion, constitutes the irregularity.

Before leaving this part of the case we desire to make an observation for the guidance of counsel should a similar case arise in the future. If some irregularity comes to the knowledge of counsel before the verdict is returned, he should bring it to the attention of the Court at the earliest possible moment so that the presiding Judge may consider whether or not to discharge the jury without giving a verdict. Matters of this sort ought not to be held in reserve with a view to taking them before this Court when it may be, as here, too late to remedy the mistake. In this connection we call attention to the concluding passages of Lord Simon's speech in *STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS* (30 Cr. App. R., at p. 56; [1944] A. C., at p. 328).

In this case the irregularity should have been mentioned to the Recorder before the jury returned their verdict. But it seems clear that had this been done the result would have been the same. The Recorder believed after his reference to *Archbold* that he had power to give permission to the jury to leave the Court, and counsel had not, nor could it be expected that he would have, the authorities at hand to deal with such an exceptional situation. Accordingly, there is no reason to suppose that had he mentioned it before verdict the Recorder would have acted otherwise than he did. In these peculiar circumstances we are attaching no blame to counsel, who was faced with a situation which might well have disconcerted the most experienced practitioner. We desire, however, to

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

emphasise that if an irregularity arises in a trial which can be cured, and it is not brought timeously to the attention of the Court of trial, it does not by any means follow that this Court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction.

The point now arises whether the Court, having quashed the conviction, should order an acquittal or make some other order under the special provisions of the Act, as was done in *CRANE'S CASE* (*supra*). The question is, then, has the Court power to order a further trial by awarding a *venire de novo*? At first, when this matter was discussed, the Court inclined to the view that they could set aside the verdict and order a *venire de novo*. In *KETTERIDGE'S CASE* (*supra*) the Court said that the only course open to the Court is to discharge the jury and to commence the proceedings afresh, and a few lines further down it was said (11 Cr. App. R., at p. 57; [1915] 1 K. B., at p. 471): "It is, of course, open to the Crown to recommence the proceedings". It will, however, be observed that the question as to whether the Court had power to order a re-trial had not been argued. No doubt, if it is brought to the attention of the Court before the verdict is given that the jury have separated, the Court should at once discharge them from giving a verdict and order the proceedings to begin *de novo*, but both in *KETTERIDGE'S CASE* (*supra*) and in the present verdict was delivered and recorded and judgment was given.

Now in our opinion, if it transpires that there has been a mis-trial, then, whether the offence amounts to a felony or a misdemeanour, the Court can order the case to be re-tried, but in order that it may be said that it is a mis-trial the circumstances must be such as render the trial a nullity from the outset. In *CRANE'S CASE* (*supra*), which was one of felony, the appellant was indicted for the offence of receiving stolen goods. There was a separate indictment against the thief. No doubt by some oversight the two prisoners were given in charge of the same jury and were tried together, and both were convicted and sentenced. It seems that the Clerk of the Peace at the Leicester City Sessions, having the two indictments

before him, arraigned the prisoners as though they were jointly indicted, and the fact that there were separate indictments was not brought to the attention of the Recorder or of the counsel in the case. The House of Lords held that the trial was a nullity and that there must be a fresh trial, and other cases can be found in the books in which this course has been taken both in cases of felony and of misdemeanour. Most of them will be found collected in the judgment of Blackburn, J., in WINSOR'S CASE (1865), L. R. 1 Q. B. 289, at pp. 318 and 319), from which it is clear that if there has been such an irregularity as would make the trial a nullity, or if the jury return a wholly imperfect verdict, the Court can direct a *venire de novo* even in the case of a felony. The law was much considered in MURPHY (1869), L. R. 2 P. C. 535, following on the case of BERTRAND (1867), L. R. 1 P. C. 520; and Sir William Erle, in stating the advice which the Judicial Committee would tender to Her Majesty in MURPHY'S CASE (*supra*), said (L. R. 2 P. C., at p. 548): "The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digests; they are cases of defect of jurisdiction in respect of time, place or person—cases of verdicts so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the Court considers unsatisfactory". We think that this applies not only to a charge of felony but also to one of misdemeanour. Moreover, whereas in this case the indictment charges both felonies and misdemeanours, as it can do under the Indictments Act of 1915 but could not do so before, it is quite clear that if a *venire de novo* were awarded the whole indictment would have to be tried over again, and so the charges of felony of which the prisoner was acquitted would have to be re-tried as well as the misdemeanours of which he was convicted. But that in

1949.
July 14, 25.

FRANK NEAL

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

the opinion of the Court is not the governing consideration. This trial cannot in any sense be said to have been a nullity because of an irregularity on the part of either Judge or jury after all the evidence had been heard and the summing-up had taken place. Down to that point everything was regular and in order. We think a test of what would amount to a mistrial sufficient to render the trial abortive and void would be whether the irregularity would be patent on the record if it were drawn up. If, for instance, the record in CRANE'S CASE (*supra*) had been drawn up, it would have appeared that there were two indictments and not a joint indictment. Both indictments would have had to be set out, and yet one verdict was returned and one judgment delivered. So, too, if an indictment were preferred at quarter sessions which quarter sessions had no jurisdiction to try, there would be a patent defect at once apparent on the record; the prisoner would never have been in peril of a lawful sentence being passed upon him, and there would in fact have been no trial. Or again, it might appear that only eleven jurors were empannelled, for when the record was drawn up in former days the names of all the jurors sworn appeared thereon. Another case which occurred not many years ago was where a Recorder of a borough, on account of illness, had appointed a deputy to sit in his place and it afterwards appeared that the deputy had not the necessary qualification. The conviction, therefore, was *coram non judice* and the conviction was quashed and a *venire de novo* directed. That is an instance where the irregularity would not appear on the record. There are also several cases, most of which will be found referred to in WINSOR'S CASE (*supra*), of verdicts so defective or ambiguous that no judgment could be founded thereon. In all this class of case the trial has been and could only be treated as a nullity, but it is impossible to hold that the reasoning on which those cases depend applies to the circumstances of the present. We think we are entitled to treat what the Court said in KETTERIDGE'S CASE (*supra*) as merely *obiter*. It will be observed that the Court there did not order a *venire de novo* and, as we have already said, they

expressed an opinion on a matter which had never been argued. We are therefore of opinion that we have no power to order a re-trial in this case and that all we can do is to quash the conviction.

1949.
July 14, 25.

FRANK NEAL.

Goddard,
L.C.J.,
Oliver, J.,
Stable, J.

We point out that after verdict the prisoner asked that a large number of similar cases should be taken into consideration. It is, therefore, open to the Crown still to proceed against him if so advised in respect of those cases, because since the decision of this Court in *NICHOLSON* (1947), 32 Cr. App. R. 127, it is clear that *autrefois convict* cannot be pleaded where cases have been taken into consideration but the substantive conviction has afterwards been set aside. It was pointed out that taking offences into consideration was in no sense a conviction upon them. They were merely taken into consideration so as to prevent the prisoner being re-arrested and charged when he came out of prison from serving the sentence passed on the indictment. It may be that the Court increases the sentence, but it still has to be one which the offence charged in the indictment would carry. It has been held in this Court that a prisoner charged with the misdemeanour of attempting to break and enter, who asked for other offences, whether of breaking and entering or attempting to do so, should be taken into account, could not receive a sentence in excess of two years because the sentence must be one justified by the indictment on which judgment was passed. It is not for us to say whether the Crown should proceed. We only point out that they can do so if they choose.

In conclusion the Court desires to express its indebtedness to Mr. Cowley for his careful argument, in the course of which he drew the attention of the Court to the cases which enabled them to correct the first impression they had formed on reading the *dicta* of the Court in *KETTERIDGE'S CASE* (*supra*).

Conviction quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE HILBERY
AND MR. JUSTICE CROOM-JOHNSON.

LEONARD JACK THOMAS.

1949.
Aug. 29, 30.

*Wounding with Intent to Murder—Conviction—Subsequent Death
of Victim—Conviction of Murder.*

The appellant was convicted of wounding his wife with intent to murder her. Within some ten weeks of the injuries inflicted on her the appellant's wife died as the result of those injuries, and the appellant was then indicted for, and convicted of, the murder of his wife.

Held, that the conviction was good, and was not invalidated on the ground of *autrefois convict*, or by reason of the provision in s. 33 of the Interpretation Act, 1889, that an offender "shall not be liable to be punished twice for the same offence".

MORRIS (1867), L. R. 1 C. C. R. 90; 10 Cox C. C. 480, applied.

MILES (1890), 24 Q. B. D. 423 and TONKS, 11 Cr. App. R. 284; [1916] 1 K. B. 443, referred to.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on July 13, 1949, of the murder of his wife and was sentenced by Devlin, J., to death.

On March 20, 1949, the appellant inflicted serious injuries on his wife. On May 2, 1949, he was convicted at the Central Criminal Court of wounding her with intent to murder and was sentenced to seven years' penal servitude. On June 2, 1949, the appellant's wife died of the injuries which the appellant had inflicted on her, and he was then indicted for murder. A plea of *autrefois convict* was filed on his behalf, but, on the direction of Devlin, J., was found by the jury not to be established.

R. T. Paget, K.C., L. L. Rose and T. R. Heald, for the appellant.

E. Anthony Hawke and J. S. Bass, for the Crown.

The arguments of counsel for the appellant appear fully from the judgment.

Counsel for the Crown were not called on to argue.

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croom-
Johnson, J.

HUMPHREYS, J.: This is an application by Leonard Jack Thomas for leave to appeal against a conviction for murder, and is treated as an appeal. The appellant was convicted at the Central Criminal Court on May 2 last of having on March 20 feloniously wounded his wife, Florence Ethel Lavinia Thomas, with intent to murder her, and was sentenced to seven years' penal servitude. At that time his wife was in hospital. She subsequently died on June 2 as the result of those wounds. The appellant was then indicted at the Central Criminal Court upon July 13, in accordance with the usual practice, for the murder of his wife. I repeat those words "in accordance with the usual practice" because it is the usual practice; similar facts have occurred time out of mind, and the same results have followed.

The appellant handed in as answer to the indictment a plea in bar, that is, a plea of *autrefois convict*. The trial Judge, Devlin, J., after listening to a very long argument, held that the plea was not made out, and so directed the jury, who followed his direction. The appellant was then tried upon his plea of Not Guilty on the indictment for murder, and the jury convicted him of murder. From that conviction he has appealed to this Court, the sole ground of appeal being that his plea of *autrefois convict* ought not to have been rejected. He makes no complaint of any shape or kind as to the trial for murder. The whole question is: was the plea of *autrefois convict* a bar in law to the indictment for murder?

The nature of the plea, and indeed the law relating to it, sufficiently appear from the language of the plea itself, which alleges that the King ought not further to prosecute the indictment against the appellant because he has been lawfully convicted of the offence charged therein.

Murder consists in the felonious killing of another with malice. It is plain that the appellant was not convicted on

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,

Hilbery, J.,

Croom-
Johnson, J.

May 2 of that offence, nor of anything which is substantially the same offence as that charged in the indictment; nor could he have been, since his wife was then alive. It follows that the plea of *autrefois convict* in the strict sense of the term is bound to fail, and does fail.

That would dispose of this case but for the fact that before Devlin, J., and to this Court, Mr. Paget has argued other grounds which, he says, do not depend upon the plea of *autrefois convict*, though they are of the same nature. He referred to a number of cases, mostly charges of assault, in which the Courts have expressed their approval of the ancient maxim "*Nemo debet bis puniri pro uno delicto*", that is to say that no one ought to be twice punished for one offence, or, as it is sometimes written, "*pro eadem causa*", that is, for the same offence, and have treated the earlier conviction as being a bar to the second indictment.

In the case of *MILES* (1890), 24 Q. B. D. 423, which is perhaps the strongest case in favour of the argument of the appellant in regard to charges of assault, the prisoner was indicted on five counts. The first count charged him with unlawfully and maliciously wounding Charles Living, on October 26, 1889; the second with inflicting a grievous bodily harm upon the same person on the same day; the third with assaulting that person causing him actual bodily harm on the same day, and the fourth with common assault on the same person on the same day. The fifth count related to another person. The Appeal Court then was not troubled with the question of that common assault, because the jury acquitted upon that charge, there remaining the other three charges in the indictment upon which he was convicted before the Recorder of London on December 16, 1889. He had already been convicted before a Court of summary jurisdiction on October 28, 1889, of common assault, and that same common assault was the same as was charged in the fourth count of the indictment. The Court, after argument, upheld the plea, which they regarded as an informal plea of *autrefois convict*. The important thing to do in this case is to examine the reasons why the Court so held.

All the Judges considered that the plea and the evidence established that there was one offence only committed by that person, one and the same assault, although in three of the counts that assault was alleged to have been accompanied by circumstances of aggravation. Pollock, B., in his judgment said as follows (at p. 436): "At the trial it was proved on behalf of the prisoner, and admitted by counsel for the prosecution, that the first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred", and he then quotes the Latin maxim. Charles, J., in whose judgment Lord Coleridge, C.J., and Grantham, J., concurred, referred (at p. 438) to the rule which I have previously mentioned as the "well-established rule at common law that where a person has been convicted of an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence". Hawkins, J., who gave the first judgment in the case, agreeing as he did with that proposition which I have just read from the judgment both of Pollock, B., and Charles, J., said this (at p. 433): "But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for an offence in which that assault was an element". That is precisely this case, because no one will doubt that the assault committed upon the deceased woman was an element in the charge of murder. It was one of the principal elements; the other was the death of the woman. Hawkins, J., continued: "It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing". In our judgment, that observation applies with equal force to the present case, and is sufficient to dispose of

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croome-
Johnson, J.

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croome-
Johnson, J.

this case so far as it depends upon *autrefois convict*. It is right to say, though lawyers will not need the information, that when Hawkins, J., is speaking of a common assault, his observations equally apply to every other form of assault. The point in MILES'S CASE (*supra*) was that there was one assault, and every count in the subsequent indictment charged that assault, and nothing else, though there were circumstances of aggravation of different characters added to it.

In deference to the argument which we heard, and which the learned trial Judge heard at much greater length, it is right to add this. References to section 33 of the Interpretation Act, 1889, were made by Mr. Paget, who said that that section assisted his argument. That section provides: "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law . . . the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence". That Act may be said to state, in the language dear to the persons who prepare and are responsible for the language of statutes, what the common law says in very much shorter and simpler language. Certainly it adds nothing and it detracts nothing from the common law. Mr. Paget has argued that we ought so to read the section that the last word "offence" should be read as meaning "act", and it was submitted that "act", "cause" and "offence" all mean the same thing.

In our view that is not correct. It is not the law that a person shall not be liable to be punished twice for the same act; no one has ever said so in any case, and the Interpretation Act does not say so. What the Act says is that a person "shall not be liable to be punished twice for the same offence". Not only is it not the law, but it never has been the law, and that it is not the law was expressly decided in the highest criminal Court in the land then existing, the Court for the Consideration of Crown Cases Reserved, as far back as 1867, in MORRIS (1867), L. R. 1 C. C. R. 90; 10 Cox C. C. 480.

That was a case in which Kelly, C.B., Martin, B., Byles, Keating and Shee, JJ., were sitting. The case had been reserved by Pigott, B. The headnote in *Cox's Criminal Cases* is as follows: "A previous summary conviction for an assault" under the Act "is not a bar to an indictment for manslaughter of the party assaulted, founded upon the same facts. Kelly, C.B., *dissentiente*". I will read first part of the judgment of Martin, B., with whose judgment Keating and Shee, JJ., agreed (at pp. 93 and 484 of the respective reports): "Thomas Morris was convicted of an assault on Timothy Lymer and committed to prison. . . . He has undergone that punishment, and Timothy Lymer, the man assaulted, has since died in consequence of that assault. Now, this indictment is for the manslaughter of that man; and the question is, whether the suffering of the imprisonment for the assault is an answer to that indictment, and that depends on the meaning of the words 'for the same cause' in the statute". "The same cause", it was stated on the authority of the same Judge, Martin, B., means the same thing as "the same offence". He said (at pp. 94 and 485 of the respective reports): "The cause on which the justices adjudicated", that is, the assault, "was not the same as that for which the prisoner has been convicted under this indictment", that is, the manslaughter. "A new offence in my opinion arose when the man died. I think therefore that this conviction was right".

Byles, J., said this (1867), L. R. 1 C. C. R., at p. 94; 10 Cox C. C., at p. 485): "I am of opinion that the prior conviction affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and intention of the common law pleas of *autrefois convict* and *autrefois acquit* show that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has already been decided. There has, in the present case, been no judicial decision on the same accusation, and the whole question now in dispute could not have been decided, for at the time of

1949.
Aug 29. 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croom-
Johnson, J.

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,

Hilbery, J.,

Croom-
Johnson, J.

the hearing before the magistrates, whether the assault would amount to culpable homicide or not depended on the then future contingency whether it would cause death. . . . The cause for the present indictment comprehends more than the cause in the former summons before the magistrates, for it comprehends the death of the party assaulted". He adds it was therefore not the same cause. At the end of the judgment he uses these words: "My Brother Martin has already illustrated the mischief in civil cases by a reference to Lord Campbell's Act. In criminal cases the mischief might be much greater. A murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime".

It is only right to refer shortly to the dissenting judgment of Kelly, C.B., and with the most profound respect to the Chief Baron it is necessary to say that his judgment, so far as I am aware, has never been quoted with approval in any case since 1867, and has never been followed. What he said was precisely what Mr. Paget has argued, or rather perhaps it would be more accurate to say that Mr. Paget has argued to us something founded upon what Kelly, C.B., said in 1867, which was not the law and with which statement the other four Judges disagreed. Kelly, C.B., said (1867), L. R. 1 C. C. R., at p. 92; 10 Cox C. C., at p. 482): "The assault, the unlawful act, with which he was charged"—that is, the manslaughter—"is the same assault and one and the same act as that which caused the death of Lymer, and of which he has been convicted under the present indictment". Mr. Paget was putting it the other way round when he argued that the original assault was the same assault as the one under which the appellant had been convicted under the indictment. The answer is, of course, that Morris was not convicted of assault under that indictment at all, but was convicted of manslaughter. Kelly, C.B., continued: "I think, therefore, that the case comes within the precise words" of section 45 of the Offences against the Person Act, 1861, which provides

that in such a case " ' he shall be released from all further or other proceedings, civil or criminal, for the same cause ' "

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croom-
Johnson, J.

Counsel for the appellant also relied upon a passage in *Archbold's Criminal Pleading, etc.*, 81st ed., at p. 135. The same phrase occurs, as I have been able to find out, in every edition of *Archbolds* since 1889. The statement appears under the heading of "*Autrefois acquit*", and after quite properly referring to *Hawkins' Pleas of the Crown*, where it is stated "it is an established rule of the common law that a man may not be put twice in peril for the same offence", the learned editor refers to the Interpretation Act, 1889, s. 33, and says: "Perhaps this enactment would have been clearer if for the word 'offence' at the end had been substituted the words 'act or omission'. But it does no more than extend to statutory offences the common law rule as laid down in *R. v. MILES (supra)*". Exactly what that means I do not know, but I deprecate the use by any textbook writer of such an expression as "the Act should have done something which the Act does not do". It is quite clear that the word in the Act is "offence", and I deprecate this suggestion by the textbook writer that the Act, to have made things clear, should have enacted something quite different. The answer is that it does not. Later on in the same textbook, two pages further on, we find a different statement as to the law, and still further on we find a still further statement as to the law in regard to *autrefois convict*. They do not all agree with one another. There may be a certain amount of mental confusion in the statement on p. 135. Exactly what it means it is not necessary for this Court to decide, but we are all agreed that if that passage bears the interpretation which Mr. Paget seeks to put upon it, then, in the opinion of the Court, it is wrong.

MORRIS (*supra*) was followed in FRIEL (1890), 17 Cox C. C. 325. That case came before Williams, J., on the Liverpool Summer Assizes, and there is a very full and interesting statement of the law by that learned Judge. The prisoner had been summarily convicted under the Summary Jurisdiction Act, 1879, of assault, and the person assaulted had subsequently

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,

Hilbery, J.,

Croom-
Johnson, J.

died of the injuries caused by the act constituting that assault. A plea of *autrefois convict* was entered in answer to the indictment for manslaughter. It was held that the plea of *autrefois convict* was not a good answer by the person so summarily convicted to the indictment for manslaughter. Williams, J., having taken time to consider an application that he should reserve the question for the Judges, said this (17 Cox C. C., at p. 326): "I have looked at the authorities, and I think that it is plain on the authorities that a conviction or acquittal on an indictment for an assault cannot be pleaded in bar to a subsequent indictment for murder or manslaughter. This proposition is expressly laid down by Byles, J., in delivering the judgment of himself and Keating, J., in *MORRIS (supra)*. It is true that Kelly, C.B., dissented, and is true that in that case the question to be decided was the construction and effect of volumes 24 & 25 Vict. c. 100, ss. 44 and 45, and was not the question of the effect of a previous conviction on an indictment, but the decision has, I believe, always been recognised as a decision on the common law question, and is so treated by Hawkins, J., in the recent case of *MILES (supra)*, where he says it would hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing. So also of manslaughter (see *MORRIS (supra)*). This seems in accordance with principle. The indictment for manslaughter is not a charge in a new form based on the facts supporting the former charge, nor is it the former charge with the addition of matters of aggravation or of newly alleged consequences. It is a charge based on new facts; and the circumstances that some of those facts have been made the basis of a former charge of a different class is immaterial. The difference is not of degree merely. The characteristic new fact here is the death. That death is a new fact, and not a mere matter of aggravation or a mere consequence, is plain from the consideration that in cases of manslaughter, where the charge is based on death resulting

from culpable negligence, there is no criminal offence unless death ensues and gives rise to a charge of manslaughter. I wish to add that this view of the law that a prior conviction for assault cannot be effectively pleaded in bar to a subsequent indictment for murder or manslaughter, is confirmed by the great authority of Stephen, J., in his book on *Criminal Law Procedure*, at p. 173, who, though in terms he does not mention manslaughter, yet lays down the principle, and gives indictment for murder after a previous conviction for unlawful wounding as an illustration, and no reason has been suggested to me, or I believe could be suggested, why the doctrine thus illustrated should not include manslaughter as much as murder”.

There are many other decisions to be found in the books which are quite inconsistent with Mr. Paget's argument. In the report of MORRIS, in 10 Cox C. C. 480, there is a reference by way of note to a case of ANTONIO DE SALVI, who was indicted for the wilful murder of Robert Henderson Robertson. A plea of *autrefois acquit* was pleaded, to which the Crown demurred, and the plea was held bad in law. That case is not fully reported, and perhaps it would be more satisfactory not to rely upon it. On the facts it appears to have been precisely the present case. De Salvi had been indicted for wilful murder, and it was proved that he had been indicted for cutting and wounding with intent to murder and acquitted upon that charge. When he was charged with killing the person in regard to whom he had been acquitted upon the charge of cutting and wounding, the Court held unanimously that that was no answer, and that he must be tried upon that charge of murder. Those are precisely the facts of the present case, because that is the offence which was charged against the appellant, and of which he was convicted, and the subsequent indictment against him was for murder.

Mr. Paget then developed another point. He said that it is a recognised rule that a person not only may not be indicted for an offence of which he has already been convicted or acquitted, but he must not be indicted for an offence upon

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys.
J.,
Hilbery, J.,
Croom-
Johnson, J.

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croom-
Johnson, J.

which he was in peril on the former occasion though not convicted or acquitted, and, generally speaking, subject to certain narrow limits, that may be accurate. He contended that the appellant was convicted of wounding with intent to murder and could have been convicted by the jury upon the indictment for murder of that same offence. When learned counsel made that statement, my brothers and I simultaneously asked: "What is the authority for that?", because none of us was aware that such a proposition had ever been put forward in a Court of law. Mr. Paget's answer was: "I have no authority in support", and one of my brothers then asked this pointed question: "Can you tell the Court of any case that you have ever heard of anywhere in England where it has been even suggested that a man who is tried on a charge of murder may be found by the jury not guilty of murder but guilty of wounding with intent to murder?", and the answer was: No. This, therefore, is an entirely new and novel proposition.

The ordinary rule is well known and unquestionable. The jury is bound to find the verdict, if they agree, upon the indictment. They are not allowed to find any other than a verdict of Guilty or Not Guilty unless some statute, or in very rare cases the common law, permits them to find some lesser or different crime, while acquitting upon the actual charge in the indictment. That is the rule. There are numerous exceptions to that rule, because many statutes have been passed within the last fifty years which enable the jury to find a verdict of Guilty of charge A, or of charge B, C, D or E, and so forth.

There are many such instances, but no one has ever suggested hitherto that there is either a statute or a common law rule by which a jury can, upon a charge of murder, find the statutory felony of wounding with intent to murder, although they can certainly find manslaughter which is comprised in murder, and certainly can find an attempt, because every jury in every indictable criminal case now can find an attempt, and have been able to do so since 1851. That is a very formidable objection to Mr. Paget's argument. It cuts away the whole

basis of it. But assuming for the moment that a jury could find such a verdict, what would be the result? Counsel contended that, if they could find wounding with intent to murder, then the appellant was in peril of being convicted of wounding with intent to murder. He said that they could find that verdict because it was so decided in *WHITE*, 4 Cr. App. R. 257; [1910] 2 K. B. 124, which is a decision of the Court of Criminal Appeal. It has nothing whatever to do with *autrefois convict* or *autrefois acquit*. White was not convicted twice or acquitted twice; he was only tried once, and these are the facts. The headnote in the *Law Reports* is: "A person who upon an indictment charging him with murder is convicted . . . of an attempt to murder may be sentenced to penal servitude for life by virtue of the provisions of sections 11 to 15"—and I would say for myself that section 15 is the important one—"of the Offences against the Person Act, 1861". The prisoner was tried at the Birmingham Assizes on an indictment charging that he did murder one Mary Ann White. A wineglass was found close to the deceased woman in her house at Coventry containing lemonade with a small quantity of cyanide of potassium. The medical evidence showed that death was not due to poisoning. No trace of cyanide was found in the body. The prisoner was proved to have purchased some cyanide of potassium shortly before, and there was evidence on which, as the Court held, the jury would be justified in inferring that the prisoner had put into the deceased's glass the cyanide that was found there, and that he did so with intent to murder her. The jury convicted him of an attempt to murder and he was sentenced to penal servitude for life. He appealed against conviction and sentence. The Court disposed of the appeal against conviction on the facts of the case, saying in effect that there was ample evidence to justify the jury coming to the conclusion at which they had in fact arrived. Bray, J., giving the judgment of the Court, consisting of Lord Alverstone, C.J., Bray and Pickford, JJ., said this (4 Cr. App. R., at p. 272; [1910] 2 K. B., at p. 130): "We now come to the most difficult point, which was this", that is, the sentence. I do

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croome,
Johnson, J.

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croomb-
Johnson, J.

not think I need read the rest of the judgment, because it has absolutely nothing to do with this case at all, and is merely upon the question whether a person convicted in those circumstances of attempting to murder on an indictment for murder can be sent to penal servitude, or whether the offence of which he has been convicted is regarded in law as a common law misdemeanour, the attempt to commit a felony, and therefore subject only to two years' imprisonment. That is the whole point in the case, apart from the conviction, which did not raise any point of law. It was suggested that the jury ought to have come to a different conclusion and the Court did not agree.

Upon that submission, references were made to various statutes and so forth. It is only necessary to refer to one section of one statute, beyond saying first of all that in 1851 there was a general Act passed which enabled juries to return a verdict in most cases of Not Guilty of the crime charged, but Guilty of the attempt. It is a general Act, the Criminal Procedure Act, 1851. Later on in 1861 there was a series of consolidation Acts, and one of them contained a number of new provisions and provided for what were called statutory felonies, that is to say a number of methods by which a person might attempt to kill another were collected in different sections, and they were all made felonies. Some of them had been taken from old statutes and they were all put together in sections 11, 12, 13 and 14 in what was called the Offences against the Person Act, 1861. The question in *WHITE'S CASE* (*supra*) was whether, in the circumstances of that case, the offence came within that list of statutory felonies, or ought still to be regarded as a common law misdemeanour and what sentence could be awarded. Section 15 of the Offences against the Person Act, 1861, which the Court thought was decisive of the matter, provides: "Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life". It was held by the Court that any

person charged with murder in regard to whom the jury find Not Guilty of murder but Guilty of attempted murder, is thereby convicted of an offence for which he is liable to be kept in penal servitude for life. That is the whole of the case of WHITE (*supra*), and in regard to Mr. Paget's argument that that is an authority for saying that therefore a jury can upon a charge of murder find a verdict of wounding with intent to murder, I can say no more except that I simply do not understand it.

It is necessary just to refer to one more case so far as that case did deal to some extent with the question what is to happen if a man is tried upon a charge upon which he has not been tried before, but where it is open to the jury upon the later charge to find him guilty of some other charge of which in fact he has been already convicted. That case was TONKS, 11 Cr. App. R. 284; [1916] 1 K. B. 443. Mr. Paget frankly said, in referring to it both in the Court below and in this Court: "TONKS (*supra*) is my great difficulty"; and I think a member of the Court observed: "It is one of your difficulties only, but it certainly is a difficulty". Mrs. Tonks had been convicted of the offence of wilfully neglecting her child in a manner likely to cause injury to its health, and she was sentenced to prison for that offence. While she was in prison the child died, and died, we must assume, as the result of that neglect. She was then charged, in accordance with the usual practice, with manslaughter, in having caused her child's death by neglect. It was the same neglect, of course, as had been the substance of the case against her when she was convicted and sent to prison, but there was the added fact of the death. In that case no actual plea of *autrefois convict* was handed in, but the Court of Criminal Appeal agreed that it ought to look into the circumstances and, if a plea of *autrefois convict* would have been effective, to give effect to it, although it was not upon the file. Lord Reading, C.J., gave the judgment of the Court, the other members of the Court being Lord Coleridge and Avory, JJ. It appeared that under section 12 of the Children Act, 1908, the section under which she had been

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croon-
Johnson, J

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.

Humphreys,
J.,
Hilbery, J.,
Croom-
Johnson, J.

originally convicted, there was a special provision that if a person were charged with manslaughter of a child, as the result of neglect, and the jury did not think that the child died as the result of that neglect but were satisfied that there was criminal neglect of the child, they might convict, upon the charge of manslaughter, of that offence instead of manslaughter. Lord Reading made it clear to begin with that that only meant that if the jury were not satisfied that the woman was guilty of manslaughter—that is the first thing—then they should decide whether she was guilty of something less, that is, neglecting her child. In giving judgment, Lord Reading observed as follows (11 Cr. App. R., at p. 287; [1916] 1 K. B., at p. 449): “On behalf of the appellant it was also urged that on the second trial she was charged with the offence with which she had already been convicted, because the greater charge includes the less”—that means the manslaughter includes the neglect—“but that contention ignores the most important fact of the subsequent death of the child, which occurred some days after her first conviction. At the date of the first trial for the offence of wilful neglect, whether it had taken place under the Summary Jurisdiction Acts or on indictment, it would have been impossible to charge her with manslaughter because the death had not then occurred”. That, of course, is dead against Mr. Paget on his first point; it is only one more authority to that effect. The learned Judge continued: “When the death occurs after the conviction for the lesser offence and an indictment for manslaughter is preferred, no difficulty arises, because proper effect can be given to section 12 (4) by the Judge telling the jury that they must, having regard to the special facts of the case, either come to the conclusion that the accused is guilty of manslaughter or return a verdict of acquittal. The Judge could not, as he could in a normal case under the section where there had been no previous conviction for wilful neglect of the child, point out to the jury that it is open to them if they think fit to find the prisoner guilty only of the lesser offence on the indictment for the greater one. In our view it is wrong to say that a person indicted for the manslaughter of a child whose

death has occurred after the conviction of the same person for the wilful neglect of that child is twice put upon his or her trial for the same offence”.

That case was quoted to Devlin, J., by Mr. Paget on the argument on the question of *autrefois convict*; it had not been referred to in open Court, but it was referred to in the summing-up of the learned Judge on the indictment for murder. What in fact he said to the jury was that in this particular case they must either convict of murder or find a verdict of Not Guilty. That is exactly what Lord Reading had said that the Judge might do. Devlin, J., did not say to the jury that they must take this course, because the appellant had been previously convicted of anything, but put it, as I understand, upon this ground, that the evidence that he committed murder, that is to say that he intended the death of the deceased, or to do her grievous bodily harm, which would make the offence one of murder, really depended upon the facts of the case. There were no outside facts. What was said by the prosecution was that if a man is found with a knife attacking a woman, and driving it into her body in such a way that she promptly suffers from paralysis and is unable to move from that moment the lower part of her body at all, and then dies, there is ample evidence upon which it can be found that he knew, and must be taken to have known, that the probable consequence of his act was that there would be either death or at least terrible injury done to the unfortunate woman. But if those facts were not found, there was no other ground on which anything at all could be found against the appellant. Therefore, if the jury acquitted in this case of murder, that meant that they did not accept the evidence, and they ought to acquit altogether. That was how Devlin, J., directed the jury, in mercy to the then defendant.

In our view, he was perfectly entitled to do that. It is sufficient to say that we cannot accept the argument put forward by Mr. Paget, either on the ground that there is power in a jury to find any verdict of wounding with intent to murder upon a charge for murder, or on the ground that there was

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS

Humphreys,
J.,
Hilbery, J.,
Croomb-
Johnson, J.

1949.
Aug. 29, 30.

LEONARD
JACK
THOMAS.
Humphreys,
J.,
Hilbery, J.,
Croom-
Johnson, J.

anything wrong in the Judge's decision in advising the jury not to pay any attention to the plea of *autrefois convict*.

Finally, we have read very carefully the whole of the closely reasoned judgment of Devlin, J., in this case. We agree in the result, and we agree in the reasons given for the result by the learned Judge. The appeal is dismissed.

Appeal dismissed.

CIRCUIT CASE. [NORTH-EASTERN CIRCUIT.]

LEEDS SUMMER ASSIZES.

BEFORE

MR. JUSTICE BYRNE.

JAMES CLARKE.

1949.
July 13,
14, 15.

Rape—Husband and Wife—Separation Order—Non-Cohabitation Clause—Cohabitation Not Resumed.

The prisoner was charged with the rape of his wife. At the time of the alleged offence a separation order on the ground of the prisoner's persistent cruelty was in force containing the usual clause that the wife was no longer bound to cohabit with the prisoner, and cohabitation had not been resumed.

Held, that though, as a general proposition of law, a husband cannot be guilty of the rape of his wife, the consent to marital intercourse impliedly given by the wife at the time of the marriage was revoked by the separation order, and at the material time, therefore, the prisoner could commit the offence charged.

Motion to quash a count in an indictment.

The prisoner was charged before Byrne, J., at Leeds Assizes on July 13, 1949, on an indictment, which in the first count charged him with the rape of his wife on March 12, 1949, and

in the second count with an assault on her occasioning her actual bodily harm on the same date. The marriage took place on October 8, 1938, and on March 2, 1949, at a magistrates' court the wife obtained a separation order on the ground of the prisoner's persistent cruelty, containing the usual clause that she was no longer bound to cohabit with the prisoner. At the time of the alleged offence cohabitation had not been resumed. Defending counsel moved to quash the first count in the indictment on the ground that it did not disclose any offence known to the law.

G. De P. Veale, for the prisoner.

P. Stanley-Price, for the Crown.

BYRNE, J. : In the first count of the indictment the defendant is charged with raping his wife. His counsel has moved to quash that count on the ground that it does not disclose any offence known to the law.

As a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason is that on marriage the wife consents to the husband's exercise of the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. In such circumstances the marital right of the husband exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse, as is the case with unmarried persons. The intercourse between husband and wife is, therefore, not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage. In *Hale's Pleas of the Crown*, Vol. I, p. 629, the learned author states the law in this way : ". . . by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract".

In the present case the justices made an order on March 2, 1949, on the ground of the husband's persistent cruelty, containing a provision that the wife be no longer bound to cohabit

1949.
July 13,
14, 15.

JAMES
CLARKE.

Byrne, J.

1949.
July 13,
14, 15.

JAMES
CLARKE.

Byrne, J.

with the husband. That order has in all respects the effect of a decree of judicial separation, and one result of it is that both the person and the property of the wife are protected by it. It could be discharged if the wife committed adultery or if she voluntarily resumed cohabitation with the husband, and by "cohabitation", as I understand it, is meant intercourse when the parties have begun to live together again, or intercourse although they are not living under the same roof. In this case at the material time the wife had not resumed cohabitation. The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract existed between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked, and thereafter, in my opinion, the prisoner was not entitled to have intercourse with her without her consent. For these reasons, this motion fails.

Motion overruled.

[The prisoner then pleaded Not Guilty and the trial proceeded, and in the result he was acquitted on both counts.]

Solicitors: Wilkinson, Woodward & Ludlam, Halifax, for the prisoner; R. C. Linney, Wakefield, for the Crown.

GENERAL INDEX

- ACCESSORY AFTER THE FACT, 33
- ALIEN,
 failure to register, 41
- ANIMUS FURANDI, 67
- ATTEMPT TO COMMIT CRIME, 102
- AUTREFOIS CONVICT, 200
- BETTING,
 localisation, 76
 user of premises, 76, 159
- BIGAMY,
 belief that first marriage was void, 128
- BOOKMAKER,
 fraud on, 136
 habitual use of premises, 79
- BORSTAL TRAINING, 14, 126
- BREACH OF CONTROL, 132
- BURDEN OF PROOF, 5
- CHANCE MEDLEY, 51
- COMMISSION DAY,
 committal on, 30
- COMMITTAL FOR TRIAL, 30
- CONVICTIONS QUASHED, 1, 5, 11, 33, 59, 102, 132, 136, 151,
 159, 189

CORPORATION,
indictment of, 151

CORROBORATION, 59, 185

COUNSEL,
duty where irregularity occurs, 189

COSTS,
unsuccessful appellant, 76

COURT OF CRIMINAL APPEAL,
powers with regard to sentences of Borstal training, 126

FALSE PRETENCES,
inducement, 136
intent to defraud, 169

FINES,
new procedure as to, 92

INDICTMENT,
amendment, 143
conviction on, 164
corporation, 151
preferred by leave of Judge, 30
quashed, 30
rape, 74

INDUCEMENT,
in false pretences, 136

INTENT TO DEFRAUD, 169

IRREGULARITY IN TRIAL,
duty of counsel, 189

JOINDER OF COUNTS, 22

JURY,
separation of, 189

LARCENY,
original taking a trespass, 67

LICENSEE,

proof of knowledge of betting, 76

LOCALISATION,

in betting offences, 76

MARRIAGE,

belief as to invalidity, 128

ceremony void by English law, 121

MEDICAL EXAMINATION,

refusal to submit to, 14

MURDER,

provocation in, 51

NATIONAL SERVICE, 14**NEXUS,**

in counts of indictment, 22

PLEA,

acceptance where no evidence of offence, 11

withdrawal after sentence, 49

POLE,

liability to register as alien, 41

PREVIOUS CONVICTION,

admissibility of, 179

PROVOCATION, 51**RAPE,**

by husband, 216

indictment for, 74

RECENT POSSESSION, 100**ROAD TRAFFIC OFFENCES,**

indictment for, 74

SENTENCE,

Borstal training, 14, 19, 126
fine, 92, 132
quashed, 92
subsequent alteration of, 91
supervision after release, 164
time to count towards, 17
varied, 14
withdrawal of plea after, 49

SEPARATION ORDER,

effect on rape, 216

SINGLE JUDGE,

refusal of application by, 17

SOLEMNISATION OF MARRIAGE, 121**SPECIAL CIRCUMSTANCES, 132****SUMMING-UP,**

accessory after the fact, 33
burden of proof, 5
corroboration, 59
corruption, 5
false pretences, 169
receiving, 100

SUSPECTED PERSON, 179**TRESPASS,**

subsequently becoming larceny, 67

VENIRE DE NOVO, 189**VERDICT,**

substitution of, 1

WOUNDING,

death of victim after conviction, 200



